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24931/5







BTAN

THE LAW  
OF  
REAL PROPERTY

AND  
OTHER INTERESTS IN LAND

BY  
HERBERT THORNDIKE TIFFANY

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IN TWO VOLS.  
VOL. II.

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SAINT PAUL  
KEEFE-DAVIDSON COMPANY  
1903

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## PART V.

### THE TRANSFER OF RIGHTS IN LAND.

#### CHAPTER XVIII.

##### TRANSFER BY THE GOVERNMENT.

- § 370. The nature of the government title.
- 371. Grants by the United States.
- 372. Grants by the states.
- 373. Spanish and Mexican grants.
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The title to all lands belonging to individual owners was originally acquired from the federal or a state government, or from a foreign government formerly owning some part of the present territory included in the United States.

The public lands of the United States have been disposed of by the federal government in various modes, including public sale, sale to settlers on the land under the "pre-emption" law, gifts to settlers under the "homestead" law, grants to aid in the construction of railroads, and grants to states to aid in education and internal improvements. Mineral lands have been granted, under a separate system, to persons working them.

A grant by the government may be a legislative act, taking effect immediately; but otherwise a patent is necessary to vest the legal title to government land in an individual. A patent which is valid on its face is conclusive in a court of law, but may, in equity, be shown to have been procured or issued by fraud or mistake.

- § 370. The nature of the government title.

All the land in the United States, now owned by individ-

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uals, formerly belonged either to the federal government, to an individual state, or to a foreign nationality, which disposed of it to an individual proprietor before that particular territory became a part of this country. These grants of land by foreign states to individuals, made before the incorporation of that particular territory in the United States, are the chief basis of titles in some parts of the country, and it seems proper to briefly sketch the history of the various acquisitions of territory by this nation, in order better to understand the various classes of government grants on which the existing proprietary rights of individuals may be based.

The British claim of dominion over the territory included within the original thirteen colonies was based upon discovery, consummated by possession, the wandering Indian tribes being regarded as having a mere right of occupancy.<sup>1</sup> The dominion and ownership thus acquired was, in some of the colonies, granted by the British crown to individual proprietors or proprietary companies, by whom parts of the land were in turn granted to individuals. In others of the colonies the title to the soil remained in the British crown, and grants were made to individuals by the governor of the colony in the name of the king. After the Revolution, the title of the crown to lands still undisposed of passed to the states, and lands belonging to the original proprietaries were in some cases confiscated. Thus it may be said that the title to all land within the original thirteen states is derived, directly or indirectly, from the British crown, with the exception only of considerable bodies of land in the state of New York, the title to which is based on grants by the Dutch government or its representatives, which grants, however, were recognized and confirmed by the British crown upon the conquest of that territory.

The territory west of the Allegheny mountains and east of

<sup>1</sup> Johnson's *Lessee v. McIntosh*, 8 Wheat. (U. S.) 543.

the Mississippi river, which had been claimed by the French, came, as a result of the French and Indian war, and of the treaty of Paris in 1763, under the exclusive dominion of England. The lands within this territory were, by royal proclamation, set apart as "crown lands." After the separation of the colonies from England, a number of the colonies asserted claims to parts of these crown lands, as being included within their limits under their royal charters. These claims, so far as concerned what was known as the "Northwest Territory"—that is, the territory northwest of the Ohio river—were opposed by the other colonies in the negotiations leading up to the Articles of Confederation, and finally the colonies asserting such claims ceded practically all their lands, or their claims thereto, within the limits of such territory, to the confederation. Of the territory south of the Ohio river, the state of Kentucky was formed out of that part of Virginia west of the Allegheny mountains, while the balance of this territory, so far south as the Spanish territory of Florida, was ceded to congress by the respective states claiming it.

In 1803, the United States purchased from France the "Louisiana" territory, which was bounded on the east by the Mississippi river, and on the west by a line which ran, approximately, along the present eastern boundary of Idaho, and through the center of what are now Colorado and New Mexico. This territory extended north to Canada, and south to the Arkansas river and the present northern boundary of Texas. In 1819, the "Florida" purchase was made from Spain, this including the present Florida and parts of Mississippi, Alabama, and Georgia. In 1845, Texas, which had obtained independence from Mexico in 1836, was annexed to the United States. In 1848, as a result of the war with Mexico, that nation ceded to the United States territory included, approximately, within the present limits of

California, Nevada, Utah, Arizona, and within parts of Colorado and New Mexico, it extending in effect from the Pacific ocean to the western limit of the Louisiana purchase; and subsequently, in 1853, a comparatively small portion of territory, adjoining the present Mexican boundary, was purchased from Mexico, in order to settle a question as to the limits of the cession of 1848, this being known as the "Gadsden Purchase." In 1846, by treaty with Great Britain, the territory comprising that now occupied by Washington, Oregon, and Idaho, which had been in dispute between the two countries for many years, was ceded by Great Britain, this country ceding in return all claim to the territory to the north thereof. In 1867 the present territory of Alaska was purchased from Russia.

While by far the greater part of the lands of which either the United States government or individual states have had the ownership and control has been acquired either from a foreign state or by cession from the general government to a state, or *vice versa*, land may be acquired from individual owners, by either the United States or an individual state, by forfeiture, escheat, the exercise of the power of eminent domain, or voluntary transfer.

### § 371. Grants by the United States.

The territory ceded to the confederation by individual states, and that acquired by the present government from foreign powers, was, for the most part, free from any claims of ownership by individuals, and was therefore open to disposition by the government in such a way as seemed expedient. The land thus owned and controlled by the government, known as "public land," has been gradually disposed of to individuals and corporations by various methods, intended, and usually adapted, to aid in the settlement and (832)



industrial development of the country. The more important methods of disposition which have been adopted will be briefly described.

— Public sales.

In the early period of the land system it was the custom to offer lands, as soon as surveyed, at public sale, in accordance with a proclamation by the president, and at a minimum price.<sup>2</sup> This system of disposing of public lands gave room for much abuse and oppression, it often occurring that the land had been improved by actual settlers, who would be dispossessed by purchasers at these sales, and it gradually fell into disuse. It is now to some extent abolished by statute.<sup>3</sup> The amount of land held under title thus acquired from the government is not large.

— Pre-emption.

In consequence of the evils resulting from the system of public sales, the "pre-emption" system was instituted, by which one who settled on one hundred and sixty acres of land, improving it and erecting a dwelling thereon, was entitled to purchase the land in preference to any other person. After settling on the land, he was required to file a statement or "entry" in the land office within a certain time, declaring his purpose to claim the right of pre-emption, and also to file proof that he was entitled to the right, and to pay the sum fixed by law as the purchase price. He then received a certificate of entry.<sup>4</sup> Before making such proof and payment, the claimant was regarded as having merely a privilege to purchase the land, of which he might be de-

<sup>2</sup> See Rev. St. U. S. §§ 2353, 2357-2360.

<sup>3</sup> See 26 U. S. Stat. 1099, §§ 9, 10; 1 Dembitz, Land Titles, p. 620. note.

<sup>4</sup> Rev. St. U. S. §§ 2257-2288.

prived by the government by a grant or sale to others.<sup>5</sup> And such privilege or right of pre-emption could not, by the express provision of the statute, be assigned to another person, though the pre-emptor could transfer his interest after payment and issue of the certificate.<sup>6</sup> The pre-emption law has now been repealed.<sup>7</sup>

—— Homestead entry.

Since the repeal of the laws allowing public sales and of the pre-emption law, the only system of general application for the acquisition of public lands is under the "homestead" law. By this law, any citizen, or intending citizen, who is an adult or head of a family, who does not own one hundred and sixty acres of land in any state or territory, and who has not previously exercised the homestead right, may make application for the benefit of the law, and this, if followed by *bona fide* occupation and cultivation of the land for five years, entitles him to a certificate and patent for the land, without making any payment other than the land-office fees.<sup>8</sup>

—— Railroad grants.

Great quantities of land have been granted out of the public domain of the United States to aid and stimulate railroad construction through the territory in which the land lay. These grants usually consist of the odd-numbered sections on both sides of the railroad to a certain distance, frequently five miles, and the even-numbered sections, thereby presumably increased in value, the government thereafter holds at an increased price. In many cases these grants to

<sup>5</sup> *Frisbie v. Whitney*, 9 Wall. (U. S.) 187; *Yosemite Valley Case*, 15 Wall. (U. S.) 77.

<sup>6</sup> Rev. St. U. S. § 2263; *Myers v. Croft*, 13 Wall. (U. S.) 291.

<sup>7</sup> Act March 3, 1891 (26 Stat. 1097).

<sup>8</sup> Rev. St. U. S. §§ 2289-2302.

aid in the building of railroads have been made to the state in which the railroad was to be built, instead of to the corporation building it. In such cases the state takes merely the legal title, in trust for the railroad.<sup>9</sup>

These grants to the railroads are subject to any previous rights which may have been acquired by others in the lands granted, under the pre-emption, homestead, or other laws. To compensate for any loss to the railroad corporation through such causes, the statute making the grant usually provides for "indemnity lands" at a greater distance from the railroad, these being lands which the railroad company is authorized to take in lieu of those in its original grant already taken up by others.<sup>10</sup> A railroad grant almost invariably takes effect so soon as the survey or location of the proposed railroad through the public land has been approved by the land office, and the title to the alternate sections, as named in the act constituting the grant, then vests in the railroad company as of the date of the grant.<sup>11</sup>

#### —— Grants to states.

Congress has, at various times and for divers purposes, granted parts of the land to states. Among the most important of these grants are those for educational purposes. Usually, section sixteen in every township, and sometimes also section thirty-two, has been granted to the state or

<sup>9</sup> *Rice v. Minnesota & N. W. R. Co.*, 1 Black (U. S.) 360; *Wolsey v. Chapman*, 101 U. S. 755; *Schulenberg v. Harriman*, 21 Wall. (U. S.) 60.

<sup>10</sup> *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733; *Broder v. Natoma Water & Mining Co.*, 101 U. S. 274; *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618; *Sioux City & Iowa Falls Town Lot & Land Co. v. Griffey*, 143 U. S. 32.

<sup>11</sup> *Van Wyck v. Knevals*, 106 U. S. 360; *Sioux City & Iowa Falls Town Lot & Land Co. v. Griffey*, 143 U. S. 32; *Curtner v. United States*, 149 U. S. 672; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720.

territory for the support of schools; besides which, grants have been made for state universities, agricultural colleges, and similar purposes.

To each state, also, in which there were then public lands, five hundred thousand acres were, by act of congress, granted for internal improvements, and this grant extends to each new state as it is admitted.<sup>12</sup>

By the "swamp-land" grant of 1850, all swamp and overflowed lands unfit for cultivation on that account were granted to the several states in which they were situated, subject to certain restrictions, for the purpose of aiding in the reclamation of such lands.<sup>13</sup>

#### —— Townsites.

The statutes of the United States specify three methods by which public lands may be acquired for townsites: (1) The president may reserve land for townsite purposes on harbors or rivers, or at other possible centers of population, and lots therein may be sold at public outcry. (2) Persons desiring to found a city or town on public land may locate a townsite not over six hundred and forty acres in extent, and lay off lots therein, and the president may then authorize the sale of such lots at a minimum price of ten dollars per lot. (3) Public land which has actually been settled upon and occupied as a townsite may be entered in the land office as a townsite by the municipal authorities thereof, or by the county judge.<sup>14</sup>

#### —— Mineral lands.

Lands belonging to the United States which contain valu-

<sup>12</sup> Act Sept. 8, 1841 (Rev. St. U. S. § 2378).

<sup>13</sup> Rev. St. U. S. § 2479.

<sup>14</sup> Rev. St. U. S. §§ 2380-2389; 2 Copp, Pub. Land Laws (1890) 1010-1013.



able deposits of minerals have usually been excepted from the operation of general laws for the acquisition of land by individuals, such as the pre-emption and homestead laws. For many years, mineral lands were merely leased by the government for the purpose of working. After the discoveries of precious metals in the western territory, the mineral deposits on the public lands were worked by the immigrants under mining regulations established by themselves, and without any permission from the government, and the courts adopted the fiction that the first appropriator, in accordance with the local mining regulations, had a license from the government to work the mines.<sup>15</sup> It was not until 1866 that congress passed an act providing for the acquisition of mineral lands within the public domain by individuals at nominal prices. This statute adopted the essential features of the local miners' regulations in regard to the acquisition or "location" of claims, and all legislation by congress on the subject has recognized the validity of such regulations, as well as of state statutes, when not in conflict with the acts of congress.<sup>16</sup>

The statutes on the subject of the acquisition of claims make a distinction between mineral deposits in "lodes" or "veins," these being equivalent terms, and "placer" deposits. A "lode" or "vein," as the terms are used in the statute, is a "line or aggregation of metal imbedded in quartz or other rock in place," while the term "placer" is applied to ground which "contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place,—that is, not fixed in rock,—but which are in a loose state, and may, in most

<sup>15</sup> *Sparrow v. Strong*, 3 Wall. (U. S.) 97; *Barringer & A. Mines*, 196; *Wade, Min. Law*, §§ 2, 3.

<sup>16</sup> The United States statutes on the subject are to be found in *Rev. St.* §§ 2318-2352.

cases, be collected by washing or amalgamation without milling.”<sup>17</sup>

Any citizen or intending citizen, upon discovering a vein or lode of minerals on public land, may “locate” a claim thereto by marking the limits of his claim on the ground, and in some states, by local requirements, by posting notice of the claim, and recording a certificate of the location.<sup>18</sup> The extent of the claim is, in the case of a lode or vein, limited by the United States statute to fifteen hundred feet in the direction in which the lode or vein runs, and three hundred feet on each side of the vein; the boundaries running in the direction of the vein being known as “side” lines, and those running across the vein as “end” lines. The locator is entitled to any ore within the space marked by these surface lines extended downward vertically, and may follow the vein across his side lines, even though, in so doing, he takes ore from beneath the surface claim of another, but he cannot follow the vein across his end lines.

A placer claim or location is limited to one hundred and sixty acres in case the location is made by an association of not less than eight *bona fide* locators, and to twenty acres in the case of a location by an individual.

In order that one who has located a claim may continue to hold it, he must do work or make improvements thereon to the value of at least one hundred dollars in each year, and, in case of his failure so to do, the claim is forfeited, and open to location by another person.<sup>19</sup>

### § 372. Grants by the states.

Of the lands within the original thirteen colonies, the

<sup>17</sup> Mr. Justice Field in *United States v. Iron Silver Min. Co.*, 128 U. S. 673.

<sup>18</sup> *Barringer & A. Mines*, c. 7.

<sup>19</sup> Rev. St. U. S. § 2324; *Barringer & A. Mines*, c. 9.

larger part had, at the time of the American Revolution, been granted to individuals or to associations, to hold in private ownership, and their rights, except in so far as the lands were confiscated for disloyalty, were not affected by the transfer of the sovereignty to the state. Those lands, however, which had not been granted away by the crown, passed to the respective state governments as successors to the crown, and as representatives of the public. Such lands, the title to which was thus vested in any of the original states, have been disposed of either by special legislative grants, or in accordance with a regular statutory system, established for the purpose, providing for their survey and sale to persons making formal application to the state authorities.

The territory ceded by certain states to the general government was, to some extent, incumbered by grants previously made to individuals by the ceding state, and these grants were usually, by the agreement for cession, recognized by the United States. Of the lands of which the title thus became vested in the states, the most important were those under tidal and navigable waters, over which the state governments have always exercised control, and which they have, as a general rule, not granted away to individuals; the policy of the states, however, differing among themselves in this regard.<sup>20</sup>

Within the territory ceded to the United States by foreign governments, the states formed therefrom have no rights to vacant lands except as these may have been granted to them by the United States government. Such grants have, however, as above stated, been made to a very considerable extent, and the lands so granted to the states they have disposed of to individuals and corporations in various ways.

The land under navigable waters within the limits of the

<sup>20</sup> *Martin v. Waddell's Lessee*, 16 Pet. (U. S.) 367; *Shiveley v. Bowlby*, 152 U. S. 1. See *ante*, § 254.

territory ceded to the United States, either by one of the states or by a foreign country, passed to the United States for the benefit of the whole people, and in trust for the several states to be ultimately created out of such territory, and, upon the admission of any part of such territory as a state, such lands pass *ipso facto* to the state government, subject, however, to any grants of rights therein which may have been made for appropriate purposes by the United States government while holding the country as a territory. Consequently, the new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions, and they may accordingly grant rights therein to individuals, as it may seem most expedient, subject only to the paramount rights of navigation and commerce.<sup>21</sup>

The vacant lands which belonged to the state of Texas, lying within its limits, never became part of the public domain of the United States, there being an express provision to that effect in the resolutions passed by congress for its admission as a state.<sup>22</sup> These lands have been gradually disposed of, usually by locations under "land certificates," these certificates having been issued for various purposes, as to encourage settlement, to reward participants in the War of Independence, or their heirs, and to promote the construction of railroads.<sup>23</sup>

The systems and regulations adopted by the various states in disposing of their public lands have been of the most diverse character. Usually, however, a warrant is issued, either to one entitled as a beneficiary by some legislative act,

<sup>21</sup> *Shiveley v. Bowlby*, 152 U. S. 1.

<sup>22</sup> 5 U. S. Stat. 797.

<sup>23</sup> The mode of disposal of Texas lands is well stated in 1 *Dembitz, Land Titles*, 561 et seq.



or in consideration of the payment of a sum fixed by law, this warrant authorizing him to "locate" or "enter" a certain number of acres in the public domain. The holder of the warrant then selects his land, and files with a designated official a description of the land, this being known as the "entry." The land so applied for is then usually surveyed by the public surveyor, and, after such survey, and his compliance with all the other requirements of the statute, the applicant is entitled to a "patent" or grant from the state.<sup>24</sup>

### § 373. Spanish and Mexican grants.

Within the territory ceded to the United States by France, Spain, and Mexico, there existed, at the time of the cession, private rights based upon grants previously made by the nation having dominion therein, and these grants the United States government was, either by express stipulation in the treaty to that effect, or by provisions preserving rights of property, required to recognize.

Though the Louisiana territory was purchased from France, most of the grants made therein before its cession to the United States were made by the Spanish, and not by the French, government, the territory having passed from the former to the latter but a short time previously. The grants made within the limits of the Florida purchase previous to the treaty of cession were expressly recognized in that treaty.

Before the cession of territory by Mexico to the United States, numerous grants had been made by that government from the time of its acquisition of independence from Spain, early in the nineteenth century. Grants made before that period were by the Spanish crown, acting through the governor or viceroy.

In the performance of its treaty obligations to recognize

<sup>24</sup> See 2 Minor, Inst. 898; 1 Dembitz, Land Titles, 500; 23 Am. & Eng. Enc. Law (1st Ed.) 53 et seq.

these prior existing grants of land in the ceded territory, this government has adopted the policy of requiring all persons claiming under grants made previous to the particular cession in question to submit their claims to examination either by commissioners named for the purpose, or by the federal courts, and the claims thus submitted have been the subject of many adjudications, frequently of an adverse character.

Lands comprised within the limits of the present state of Texas have been, in succession, the subject of grant by the Spanish government, the Mexican government, the Mexican state of Coahuila and Texas, the republic of Texas, and the present state of Texas.<sup>25</sup> Grants made by the previous sovereignties have always been recognized by the present state of Texas.

#### § 374. Patents.

A patent is a document issued by the government to one to whom it has transferred or agreed to transfer land, in order to vest in the transferee the complete legal title, or to furnish evidence of the transfer. Patents are regularly issued by the United States government, and also by the state governments, to persons who have, by the proper proceedings, established their right to the ownership of land previously belonging to the United States or the state. The patent is, in form, a conveyance of the land, and must, when issued by the United States, be signed in the name of the president, and sealed with the seal of the general land office, and countersigned by the recorder.<sup>26</sup> A state patent must

<sup>25</sup> See *Republic of Texas v. Thorn*, 3 Tex. 505; *Norton v. Mitchell*, 13 Tex. 51; *Jones v. Muisbach*, 26 Tex. 237.

<sup>26</sup> *McGarrahan v. New Idria Min. Co.*, 96 U. S. 316. See Rev. St. U. S. § 450.

usually be signed by the governor, and sealed with the state seal.<sup>27</sup>

A patent is necessary to pass a perfect title to public land in all cases except when the legislative branch of the government has made a grant taking effect *in praesenti*.<sup>28</sup> Consequently, when no such previous grant has been made, the patent constitutes, and is necessary for, the transfer of the legal title.<sup>29</sup> When, on the other hand, there has been a previous grant taking effect *in praesenti*, the purpose of the issue of the patent is not to transfer the title, but to furnish evidence of the transfer, or to show compliance with the conditions thereof, obviating, in any legal controversy, the necessity of other proof of title.<sup>30</sup>

Even when there has been no legislative grant of the land, the government, upon the payment of the purchase price of land by an individual, and other compliance with the statutory requirements, thereafter holds the legal title, as any other vendor of land who has received the purchase money, in trust for the vendee.<sup>31</sup> But this mere equitable title will not support an action of ejectment at common law, and for that purpose the legal title must be acquired by the issue of a patent.<sup>32</sup> In many of the states, however, it is pro-

<sup>27</sup> See *State v. Morgan*, 52 Ark. 150; *Exum v. Brister*, 35 Miss. 391; *Hulick v. Scovil*, 9 Ill. 159; *Jarrett v. Stevens*, 36 W. Va. 445.

<sup>28</sup> *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Carter v. Ruddy*, 166 U. S. 495.

<sup>29</sup> *McGarrahan v. New Idria Min. Co.*, 96 U. S. 316; *Langdon v. Sherwood*, 124 U. S. 74; *City of Brownsville v. Basse*, 36 Tex. 500; *Roads v. Symmes*, 1 Ohio, 281, 13 Am. Dec. 621; *Carter v. Ruddy*, 166 U. S. 495; *Wood v. Pittman*, 113 Ala. 212.

<sup>30</sup> *Morrow v. Whitney*, 95 U. S. 551; *Wright v. Roseberry*, 121 U. S. 488; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241; *Kernan v. Grif-fith*, 27 Cal. 89; *Lee v. Summers*, 2 Or. 267.

<sup>31</sup> *Carroll v. Safford*, 3 How. (U. S.) 441; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210; *Hussman v. Durham*, 165 U. S. 144; *Brill v. Stiles*, 35 Ill. 305, 85 Am. Dec. 364; *Arnold v. Grimes*, 2 Iowa, 1.

<sup>32</sup> *Hooper v. Scheimer*, 23 How. (U. S.) 235; *Gibson v. Chouteau*,

vided by statute that certificates issued by the United States land office, showing the making of final proof and payment, and so entitling the holder to a patent, shall be *prima facie* evidence of title sufficient to support an action of ejectment.<sup>33</sup> But a distinction is made in this respect between receipts issued by the land office after final proof, and receipts issued merely to show that an application or "filing" has been made, and the latter will not, even under these statutes, support ejectment.<sup>34</sup> When there has been a grant taking effect *in praesenti*, the grantee may, even without the aid of any statute, bring ejectment, as having the legal title, though a patent has not been issued to him.<sup>35</sup>

A patent is, as evidence of title, conclusive in a court of law as against collateral attack, unless it is invalid on its face for insufficiency of language or execution, or unless it is void for want of power to issue it, as when the land had been previously granted, or was reserved from sale.<sup>36</sup> In equity, however, a patent, valid on its face, can, as against

13 Wall. (U. S.) 92; *Langdon v. Sherwood*, 124 U. S. 74; *Seward's Lessee v. Hicks*, 1 Har. & McH. (Md.) 22.

<sup>33</sup> See *Balsz v. Liebenow* (Ariz.) 36 Pac. 209; *Surginer v. Pad-dock*, 31 Ark. 528; *Case v. Edgeworth*, 87 Ala. 203; *Whittaker v. Pendola*, 78 Cal. 296; *Davis v. Freeland's Lessee*, 32 Miss. 645; *Pierce v. Frace*, 2 Wash. St. 81; *McLane v. Bovee*, 35 Wis. 27.

<sup>34</sup> *Balsz v. Liebenow* (Ariz.) 36 Pac. 209; *Hemphill v. Davies*, 38 Cal. 577; *Dale v. Hunneman*, 12 Neb. 221; *Adams v. Couch*, 1 Okl. 17.

<sup>35</sup> *Deseret Salt Co. v. Tarpey*, 142 U. S. 241; *Northern Pac. R. Co. v. Cannon* (C. C.) 46 Fed. 224; *Southern Pac. Co. v. Burr*, 86 Cal. 279; *Northern Pac. R. Co. v. Majors*, 5 Mont. 111.

<sup>36</sup> *Field v. Seabury*, 19 How. (U. S.) 323; *Sherman v. Buick*, 93 U. S. 209; *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488; *Davis' Adm'r v. Wiebbold*, 139 U. S. 507; *Moore v. Wilkinson*, 13 Cal. 488; *State v. Morgan*, 52 Ark. 150; *State v. Sioux City & P. R. Co.*, 7 Neb. 357; *Webster v. Clear*, 49 Ohio St. 392; *Langenour v. Shanklin*, 57 Cal. 70; *Bled-soe's Devises v. Wells*, 4 Bibb (Ky.) 329; *Jarrett v. Stevens*, 36 W. Va. 445; *Jackson v. Hart*, 12 Johns. (N. Y.) 77, 7 Am. Dec. 280; *Norvell v. Camm*, 6 Munf. (Va.) 233, 8 Am. Dec. 742.

others than *bona fide* purchasers of the land for value, be attacked, for fraud in its procurement or mistake in its issuance, either by the government or by a person otherwise entitled to the land;<sup>37</sup> and if the patent has been issued to one other than the person entitled thereto, he may procure a decree establishing a constructive trust in his favor, and requiring the patentee to make a conveyance to him.<sup>38</sup> The issuance of a patent, however, raises the presumption that it was validly issued, and one seeking to set it aside must sustain his averments in that regard by clear proof.<sup>39</sup>

A patent, when issued, dates back, as against intervening claimants, to the time when the equitable title vested in the patentee by payment of the purchase price, or otherwise.<sup>40</sup>

<sup>37</sup> *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636; *Sparks v. Pierce*, 115 U. S. 408; *Sanford v. Sanford*, 139 U. S. 642; *United States v. San Jacinto Tin Co.*, 125 U. S. 273; *United States v. Missouri, K. & T. Ry. Co.*, 141 U. S. 358; *United States v. Marshall Silver Min. Co.*, 129 U. S. 579; *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307; *Jackson v. Lawton*, 10 Johns. (N. Y.) 23, 6 Am. Dec. 311; *Romain v. Lewis*, 39 Mich. 233; *Norvell v. Camm*, 6 Munf. (Va.) 238, 8 Am. Dec. 742; *State v. Bachelder*, 5 Minn. 223 (Gil. 178), 80 Am. Dec. 410.

<sup>38</sup> *Stark v. Starrs*, 6 Wall. (U. S.) 412; *Widdicombe v. Childers*, 124 U. S. 400; *Cornelius v. Kessel*, 128 U. S. 456; *Bernier v. Bernier*, 147 U. S. 242.

<sup>39</sup> *Maxwell Land-Grant Case*, 121 U. S. 325; *Schnee v. Schnee*, 23 Wis. 377, 99 Am. Dec. 183; *City of Mobile v. Eslava*, 9 Port. (Ala.) 577; 33 Am. Dec. 325.

<sup>40</sup> *Gibson v. Chouteau*, 13 Wall. (U. S.) 92; *Hussman v. Durham*, 165 U. S. 144; *Waters v. Bush*, 42 Iowa, 255; *Reynolds v. Plymouth County*, 55 Iowa, 90; *Waterman v. Smith*, 13 Cal. 419. See post, § 377, note 76.



## CHAPTER XIX.

### VOLUNTARY TRANSFER INTER VIVOS.

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## I. CLASSES OF CONVEYANCES.

At common law, the modes of transfer of land by voluntary act of the owner were (1) feoffment, or livery of seisin; (2) fines and recoveries; (3) grant, which operated only on incorporeal things and future estates, as not being capable of livery; (4) lease, by which a less estate than that of the grantor was created; (5) surrender, by which a particular estate was conveyed to the reversioner or remainderman; (6) assignment, by which leasehold interests were transferred; and (7) exchange.

Conveyances operating under the Statute of Uses are (1) bargain and sale, and (2) covenant to stand seised.

In this country all the above classes of conveyances are valid, but feoffment, fines and recoveries, and exchange, are practically obsolete. There are, moreover, in many states, statutory provisions for conveyances in writing, without reference to any requirements existing at common law or by the Statute of Uses. A conveyance by "quitclaim," which is frequently employed, corresponds, to some extent, to a release, in that it purports to convey only such estate as the grantor owns.

A conveyance which, for any reason, cannot operate as intended, will be supported as another class of conveyance, if possible.

## § 375. Conveyances at common law—Feoffment.

The transfer of land by "livery of seisin," which has already been briefly described,<sup>1</sup> was ordinarily known as a

<sup>1</sup> Ante, § 16.

“feoffment,” and the terms were, it seems, used interchangeably.<sup>2</sup> The person making the transfer was known as the “feoffor,” and the transferee as the “feoffee.” The livery was ordinarily accompanied by a “charter of feoffment,” declaring the limitations of the estate or estates vested in the feoffee, but the livery of seisin was alone necessary until the passage of the Statute of Frauds, which in effect declared that all estates created by livery of seisin only, or by parol, and not put in writing and signed by the parties so making and creating the same, or their agents, should be estates at will merely.<sup>3</sup> This mode of transfer was available only in the case of estates accompanied by seisin,—that is, estates of freehold in possession,—and was not available for the transfer of rights in incorporeal things.<sup>4</sup>

Since a feoffment operated on the possession alone, any person having possession of land, even though, as in the case of a tenant for years, not actually seised, could, by a feoffment to a stranger, create in the latter an estate of any quantum; and so one having seisin as of an estate for life could create in another a greater estate. Since the effect of such a transfer of seisin was to operate wrongfully upon the interest of the owner of the reversion or remainder, it was termed a “tortious” conveyance.<sup>5</sup>

Transfer by feoffment is now in effect obsolete, though occasionally the theory of such a transfer may be resorted to for the purpose of upholding a conveyance otherwise invalid or ineffective to carry out the evident purpose of the parties.<sup>6</sup> In many states the statutes expressly dispense with

<sup>2</sup> Challis, Real Prop. 321.

<sup>3</sup> 29 Car. II. c. 3, § 1. See Co. Litt. 48; 2 Bl. Comm. 313; Challis, Real Prop. 326, 327.

<sup>4</sup> Sheppard's Touchstone, 228; Williams, Real Prop. (18th Ed.) 239; 2 Bl. Comm. 314. See ante, § 16.

<sup>5</sup> Co. Litt. § 611, and Butler's note; Co. Litt. 251a, 330b; Challis, Real Prop. 328.

<sup>6</sup> Hunt v. Hunt, 14 Pick. (Mass.) 374; Carr v. Richardson, 157 (848)

the necessity of livery of seisin for the conveyance of real property.<sup>7</sup>

— Fines and recoveries.

Fines and recoveries were collusive actions brought for the purpose of effecting a transfer of interests in land not otherwise transferable. They have been abolished by statute in England, and in no state of this country are they, it is believed, in practical use.<sup>8</sup> They were for many years utilized for the purpose of barring estates tail, and thereby evading the statute *De Donis Conditionalibus*,<sup>9</sup> but they were appropriate and necessary for other purposes, the most important of which was the transfer of land by a married woman, she not being competent to make an ordinary conveyance.

— Grant.

A grant was, at common law, made use of for the transfer of such interests in land as, from their nature, were incapable of transfer by feoffment,—that is, of which there could be no seisin, including all rights in another's land, or other incorporeal things, and also future estates.<sup>10</sup> A grant always involved a "deed,"—that is, a writing under seal,—since no other form of writing had, at common law, any legal effect.<sup>11</sup>

At common law the lord's right to the services of the tenant—the "seignory"—could not be transferred to another

Mass. 576; Eckman v. Eckman, 68 Pa. St. 460; Witham v. Brooner, 63 Ill. 344.

<sup>7</sup> 1 Stimson's Am. St. Law, § 1470.

<sup>8</sup> These proceedings are explained in 2 Bl. Comm. 348.

<sup>9</sup> Ante, § 27.

<sup>10</sup> Co. Litt. 9b, 49a, 172a; 2 Bl. Comm. 317; 2 Sanders, Uses & Trusts (5th Ed.) 29.

<sup>11</sup> Co. Litt. 172a; Sheppard's Touchstone, 229; 1 Hayes, Conveyancing (5th Ed.) 25; 2 Sanders, Uses & Trusts (5th Ed.) 41.

without "attornment" by the tenant,—that is, acceptance of the new lord. The same principle applied in the case of the grant of a reversion, it not being valid unless the tenant attorned to the grantee.<sup>12</sup> The necessity of attornment was, as before stated, abolished in England by 4 Anne, c. 16, § 9, and is no longer recognized in this country.<sup>13</sup>

— Lease.

A lease is a conveyance of an estate for life, for years, or at will, by one who has a greater estate. At common law, if the estate conveyed was for life, livery of seisin was also required,<sup>14</sup> but if for years or at will merely, an oral lease was sufficient.<sup>15</sup> By the Statute of Frauds, a writing was rendered necessary for the transfer of an estate for years, excepting certain leases not exceeding three years.<sup>16</sup> But, even at common law, a lease for years of an incorporeal thing was invalid unless in writing and under seal, since such a thing lay in grant for all purposes, and no other method of transfer was recognized.<sup>17</sup> The form and requisites of a lease have been previously considered, in connection with the subject of estates for years.

— Release.

A conveyance by release is a conveyance of an estate or interest in land to one who has possession thereof, or a vested estate therein. It was utilized, at common law, in cases in which the person to whom the conveyance was to be made was al-

<sup>12</sup> Litt. §§ 551, 567, 568; Co. Litt. 309a, Butler's note.

<sup>13</sup> See ante, § 47.

<sup>14</sup> 2 Bl. Comm. 318.

<sup>15</sup> Sheppard's Touchstone, 267.

<sup>16</sup> 29 Car. II. c. 3, §§ 1, 2.

<sup>17</sup> Co. Litt. 85a; Tottel v. Howell, Noy, 54; 14 Vin. Abr. tit. "Grant" (Ga.); Sheppard's Touchstone, 267; Somerset v. Fogwell, 5 Barn. & C. 875, 3 Gray's Cas. 230; Bird v. Higginson, 2 Adol. & E. 696, 3 Gray's Cas. 231.



ready in possession, so that no livery of seisin could be given unless he should first quit possession, which would have involved an idle multiplication of ceremonies.<sup>18</sup> A release may be made by the owner of the reversion or remainder expectant upon a life estate, whether it be created by act of the parties<sup>19</sup> or by act of the law, such as an estate of dower or curtesy,<sup>20</sup> the life estate being thereby enlarged to a fee simple or fee tail. A release may also be made by the owner of the reversion to the tenant of an estate for years or at will,<sup>21</sup> but not to a tenant at sufferance.<sup>22</sup> Releases thus made by a reversioner or remainderman to the particular tenants were said to inure by way of enlargement of the estate (*enlarger l'estate*).<sup>23</sup> A mere *interesse termini*—that is, the right of a lessee who has not yet entered under his lease—does not entitle him to take a release by way of enlargement,<sup>24</sup> it being necessary that the lessee be in actual possession, or in possession by force of the Statute of Uses.<sup>25</sup> A release, in order to enlarge the particular estate to one of inheritance, must, at common law, contain the word “heirs,” as in the case of a conveyance between strangers.<sup>26</sup>

A release may also be made, not by way of enlargement of an estate, but by way of passing an estate (*miller l'estate*), as when one joint tenant or coparcener releases his estate to his cotenant. In this case, words of inheritance have never been required, since the person to whom the release is made is regarded as already seised of the freehold, and the release is merely a discharge from the claim of another seised under

<sup>18</sup> 2 Pollock & Maitland, Hist. Eng. Law, 90.

<sup>19</sup> Co. Litt. 273b.

<sup>20</sup> 2 Sanders, Uses & Trusts (5th Ed.) 73.

<sup>21</sup> Litt. §§ 460, 465.

<sup>22</sup> Co. Litt. 270b.

<sup>23</sup> Litt. § 465; Challis, Real Prop. 331.

<sup>24</sup> Litt. § 459; Co. Litt. 270a.

<sup>25</sup> See ante, § 88.

<sup>26</sup> Litt. § 465; Co. Litt. 273b.

the same title.<sup>27</sup> A release was never regarded as sufficient to pass the interest of one tenant in common to another, since they are regarded as having distinct freeholds.<sup>28</sup> A third mode of operation of a release is by way of “extinguishment” of an interest in another’s land, as when the owner of a rent, a right of profit, or an easement, releases his rights to the owner of the land subject thereto.<sup>29</sup> The only other modes of operation of release at common law occurred in the case of a release, by one disseised, of all his right or claim in favor of the disseisor, or of his heir or feoffee, this being known as a “release by way of passing the right” (*mitter le droit*).<sup>30</sup>

A release must, at common law, be by deed,—that is, by writing under seal.<sup>31</sup>

Strictly speaking, at the present day, as at common law, a release cannot be made to one having neither title to or possession of the land,<sup>32</sup> but a conveyance purporting to be a release will almost invariably be upheld as a conveyance by bargain and sale or grant.<sup>33</sup>

### — Surrender.

A surrender is a yielding up of an estate for life or years to him that has the immediate reversion or remainder,

<sup>27</sup> Co. Litt. 273b, and Butler’s note.

<sup>28</sup> 4 Cruise, Dig. tit. 32, c. 6, § 25; 2 Preston, Abstracts, 77.

<sup>29</sup> Litt. § 480; Co. Litt. 280a.

<sup>30</sup> Litt. § 466; 4 Cruise, Dig. tit. 32, c. 6, § 26.

<sup>31</sup> Co. Litt. 264b; 2 Pollock & Maitland, Hist. Eng. Law, 91.

<sup>32</sup> Runyon v. Smith (C. C.) 18 Fed. 579; Branham v. City of San Jose, 24 Cal. 585; Warren v. Childs, 11 Mass. 222. Compare Sessions v. Reynolds, 7 Smedes & M. (Miss.) 130.

<sup>33</sup> Pray v. Pierce, 7 Mass. 381, 5 Am. Dec. 59; Conn’s Heirs v. Manifee, 2 A. K. Marsh. (Ky.) 396, 12 Am. Dec. 417; Hall’s Lessee v. Ashby, 9 Ohio, 96, 34 Am. Dec. 424; Baker v. Whiting, 3 Sumn. 475, Fed. Cas. No. 787; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365; Lynch v. Livingston, 6 N. Y. 422. See Ely v. Stannard, 44 Conn. 528.

wherein the particular estate may merge or "drown," by agreement of the parties.<sup>34</sup> A surrender may be either "express" or "implied," an implied surrender being usually referred to as a surrender "by operation of law."

— — **Express surrender.**

An express surrender, to be valid, must be by one in possession, and consequently it cannot be made by one having a mere *interesse termini*.<sup>35</sup> Furthermore, as above stated, the interest surrendered must bear such a relation, both in quantum and position, to the estate of the surrenderee, that it may merge therein, and consequently the estate surrendered must immediately precede the estate of the surrenderee, with no vested estate intervening, and it must be no greater in quantum than the surrenderee's estate.<sup>36</sup>

At common law, a surrender might be by parol; but by the Statute of Frauds it is provided that no surrender (otherwise than by "act and operation of law") shall be valid if not in writing, signed by the surrenderor, or by his agent, lawfully authorized.<sup>37</sup> Accordingly, mere cancellation or destruction of the lease is not effective as a surrender of a leasehold estate.<sup>38</sup>

While the words "surrender, grant, and yield up," or similar expressions, are commonly employed in a surrender, no

<sup>34</sup> Co. Litt. 387b; 2 Bl. Comm. 326.

<sup>35</sup> Co. Litt. 338b; Bacon, Abr. "Leases" (S) 2, 2.

<sup>36</sup> Co. Litt. 337b; 3 Preston, Estates, 150, 152, 194. See ante, § 32.

<sup>37</sup> 29 Car. II. c. 3, § 3. See *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145; *Kittle v. St. John*, 7 Neb. 73; *Felker v. Richardson*, 67 N. Y. 509; *Greider's Appeal*, 5 Pa. St. 422; *Burnham v. O'Grady*, 90 Wis. 461; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120.

<sup>38</sup> *Magennis v. MacCullogh*, Gilb. Cas. 235, 3 Gray's Cas. 242; *Roe d. Berkeley v. Archbishop of York*, 6 East, 86; *Doe d. Courtail v. Thomas*, 9 Barn. & C. 288; *Rowan v. Lytle*, 11 Wend. (N. Y.) 617. See *National Union Bldg. Ass'n v. Brewer*, 41 Ill. App. 223.

particular words are necessary, and it is sufficient that the intention of the parties to effect a surrender clearly appears.<sup>39</sup>

— — Surrender by operation of law.

A surrender by "act and operation of law," which is expressly excepted from the Statute of Frauds, is a surrender which the law infers from certain acts by the parties as being inconsistent with the continued distinct existence of the two former estates.

A surrender by operation of law occurs when the tenant accepts from the reversioner a new lease, to begin immediately, or at any time during the existence of the previous lease; this result being based on the theory that, by such acceptance, the tenant is estopped to deny the validity of such new lease, which nevertheless cannot be valid unless the first lease is terminated.<sup>40</sup> The new lease must be a valid lease,<sup>41</sup> and must, it seems, be sufficient to pass an interest according to the intention and contract of the parties.<sup>42</sup> The fact that the new lease is oral is immaterial if an oral lease is sufficient to create the interest intended to be

<sup>39</sup> 2 Taylor, Landl. & Ten. § 510; Woodfall, Landl. & Ten. (16th Ed.) 315; Harris v. Hiscock, 91 N. Y. 340; Shepard v. Spaulding, 4 Metc. (Mass.) 416.

<sup>40</sup> *Ive v. Sams*, 2 Cro. Eliz. 521, 3 Gray's Cas. 241; *Ive's Case*, 5 Coke, 11a; *Lyon v. Reed*, 13 Mees. & W. 285, 3 Gray's Cas. 254; *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400, 3 Gray's Cas. 267; *Bacon, Abr. "Leases" (S)* 2, 1; *Otis v. McMillan*, 70 Ala. 46; *Donkersley v. Levy*, 38 Mich. 54; *Enyeart v. Davis*, 17 Neb. 228; *Jungerman v. Bovee*, 19 Cal. 354; *Flagg v. Dow*, 99 Mass. 18.

<sup>41</sup> *Zouch v. Parsons*, 3 Burrows, 1794; *Doe d. Egremont v. Courtenay*, 11 Q. B. 702; *Smith v. Kerr*, 108 N. Y. 31, 2 Am. St. Rep. 362.

<sup>42</sup> Woodfall, Landl. & Ten. (16th Ed.) 318; *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400, 3 Gray's Cas. 267; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120. See 5 Bacon, Abr. (Am. Ed.) p. 664. But see *Hamerton v. Stead*, 3 Barn. & C. 478, 3 Gray's Cas. 246.

created.<sup>43</sup> Since the effect of a new lease as a surrender is by the operation of a rule of law, and is not the effect of an agreement of the parties, it might be considered that such operation would not be affected by the fact that it is contrary to the intention of the parties.<sup>44</sup> In at least two states, however, a different view is taken, the new lease being regarded as merely raising a presumption of a surrender, which may be rebutted by evidence that the intention was otherwise.<sup>45</sup>

If the tenant abandons possession of the premises, and the landlord consents thereto, or takes possession with the purpose of accepting the abandonment, a surrender results, whether there is or is not an express agreement that the change of possession shall have such an effect.<sup>46</sup> But the taking of possession by the landlord must be with the intention of accepting the tenant's action as a surrender of the premises, and no surrender results if he takes possession merely to protect or repair the premises.<sup>47</sup> So, the acceptance of the keys by the landlord does not necessarily

<sup>43</sup> Comyn's Dig. "Surrender," 1, 1; *Dodd v. Acklom*, 6 Man. & G. 679, 3 Gray's Cas. 250; *Evans v. McKanna*, 89 Iowa, 362; *Nachbour v. Wiener*, 34 Ill. App. 237. See *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400, 3 Gray's Cas. 267.

<sup>44</sup> See *Lyon v. Reed*, 13 Mees. & W. 285, 3 Gray's Cas. 254; *Brown v. Cairns*, 107 Iowa, 727.

<sup>45</sup> *Flagg v. Dow*, 99 Mass. 18; *Van Rensselaer's Heirs v. Penniman*, 6 Wend. (N. Y.) 569; *Smith v. Kerr*, 108 N. Y. 31, 2 Am. St. Rep. 362; *Winant v. Hines*, 6 N. Y. St. Rep. 261.

<sup>46</sup> *Grimman v. Legge*, 8 Barn. & C. 324; *Dodd v. Acklom*, 6 Man. & G. 672, 3 Gray's Cas. 251; *Lamar v. McNamee*, 10 Gill & J. (Md.) 116, 32 Am. Dec. 152; *Talbot v. Whipple*, 14 Allen (Mass.) 177; *Baumier v. Antiau*, 65 Mich. 31; *Elliott v. Aiken*, 45 N. H. 30; *Prior v. Kiso*, 81 Mo. 241.

<sup>47</sup> *Oastler v. Henderson*, 2 Q. B. Div. 575; *Finch v. Moore*, 50 Minn. 116; *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625; *Milling v. Becker*, 96 Pa. St. 182; *Texas Loan Agency v. Fleming*, 92 Tex. 458.



effect a surrender by operation of law.<sup>48</sup> Even the fact that the landlord attempts to lease the premises to another person does not necessarily show a consent to the abandonment.<sup>49</sup> But if the landlord does make another lease to a third party, since this deprives the former lessee of all dominion over the premises, it is regarded as constituting an acceptance of the abandonment,<sup>50</sup> unless he reserves his rights as against the former tenant by express notice or stipulation.<sup>51</sup>

A surrender by operation of law also occurs when the lessee consents to the granting of a lease to another, and gives up his possession to such other;<sup>52</sup> and on this principle a

<sup>48</sup> *Oastler v. Henderson*, 2 Q. B. Div. 575; *Auer v. Penn*, 99 Pa. St. 370, 3 Gray's Cas. 273; *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671; *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625; *Nelson v. Thompson*, 23 Minn. 508; *Prentiss v. Warne*, 10 Mo. 601.

<sup>49</sup> *Walls v. Atcheson*, 3 Bing. 462; *Oastler v. Henderson*, 2 Q. B. Div. 575; *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671; *Reeves v. McComeskey*, 168 Pa. St. 571; *Vincent v. Frelich*, 50 La. Ann. 378, 69 Am. St. Rep. 436.

<sup>50</sup> *Oastler v. Henderson*, 2 Q. B. Div. 575; *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145; *Ladd v. Smith*, 6 Or. 316; *Pelton v. Place*, 71 Vt. 430; *Huling v. Roll*, 43 Mo. App. 234; *Williamson v. Crossett*, 62 Ark. 393; *Schuisler v. Ames*, 16 Ala. 73, 50 Am. Dec. 168.

<sup>51</sup> *Dawson v. Lamb*, 3 Car. & K. 269; *Auer v. Penn*, 99 Pa. St. 370, 3 Gray's Cas. 273; *Underhill v. Collins*, 132 N. Y. 269; *Winant v. Hines*, 6 N. Y. St. Rep. 261; *Bloomer v. Merrill*, 1 Daly (N. Y.) 485, 29 How. Pr. (N. Y.) 259; *Brown v. Cairns*, 107 Iowa, 727; *Alsup v. Banks*, 68 Miss. 664, 24 Am. St. Rep. 294; *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625; *Rees v. Lowy*, 57 Minn. 381. See *Wolfe v. Wolff*, 69 Ala. 549, 44 Am. Rep. 526. But that the landlord cannot lease to another, and yet reserve his rights against the former lessee, see *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145.

In Illinois, a lease to another by the landlord after abandonment by the tenant does not involve a surrender, even though there is no notice or stipulation that the lease shall not have that effect. *Humiston v. Wheeler*, 175 Ill. 514; *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421, 75 Am. St. Rep. 181.

<sup>52</sup> *Nickells v. Atherstone*, 10 Q. B. 944, 3 Gray's Cas. 264; *Kinsey* (856)

surrender may be implied from the fact that the landlord accepts as his tenant a sublessee of the original tenant.<sup>53</sup> In order that, in cases of this character, the lease to a third person effect a surrender, it must be accompanied or followed by a transfer to him of the possession.<sup>54</sup>

— Assignment.

The term "assignment," in connection with the law of land, is commonly applied to the transfer of a chattel interest in land.<sup>55</sup> At common law, an assignment of an interest in land, as distinguished from an interest in an incorporeal thing, might be made without writing,<sup>56</sup> but, by the Statute of Frauds,<sup>57</sup> a writing signed by the assignor, or by his agent duly authorized, is required. The important questions as to the right of a tenant to make an assignment of his leasehold interest, and as to when a transfer by him constitutes an assignment and when a sublease, have been previously considered.<sup>58</sup>

— Exchange.

An exchange is a mutual conveyance of equal interests in distinct pieces of land. At common law, if both pieces of

v. Minnick, 43 Md. 112; Dills v. Stobie, 81 Ill. 202; Fry v. Patridge, 73 Ill. 51; Morgan v. McCollister, 110 Ala. 319; Wallace v. Kennelly, 47 N. J. Law, 242; Bowen v. Haskell, 53 Minn. 480.

<sup>53</sup> Thomas v. Cook, 2 Barn. & Ald. 119, 3 Gray's Cas. 244; Nickells v. Atherstone, 10 Q. B. 944, 3 Gray's Cas. 264; Amory v. Kannofofsky, 117 Mass. 351, 19 Am. Rep. 416.

<sup>54</sup> Wallis v. Hands [1893] 2 Ch. 75; Davison v. Gent, 1 Hurl. & N. 744; Felker v. Richardson, 67 N. H. 509.

Such a case of a new lease must be carefully distinguished from the acceptance by the landlord of the lessee's assignee as tenant under the old lease. See ante, § 46. And see Hunt v. Gardner, 39 N. J. Law, 530; Jones v. Barnes, 45 Mo. App. 590.

<sup>55</sup> 4 Cruise, Dig. tit. 32, c. 6, § 15; 2 Bl. Comm. 326.

<sup>56</sup> 4 Cruise, Dig. tit. 32, c. 6, § 20.

<sup>57</sup> 29 Car. II. c. 3, § 3.

<sup>58</sup> See ante, §§ 46, 48.

land lay in the same county, the exchange might be oral, while, if situated in different counties, a deed was required.<sup>59</sup> But, by the Statute of Frauds, a writing is necessary on the exchange of freeholds or of terms for years other than certain terms for three years or less.<sup>60</sup> No livery of seisin was necessary at common law, but each party to the exchange was required to enter while both were alive.<sup>61</sup>

A common-law exchange could not be effected unless the estates of the respective parties were of the same legal quantum,—that is, an estate in fee simple could be exchanged only for an estate of the same character, an estate for twenty years only for an estate for twenty years, and so on.<sup>62</sup> The word “exchange” was required to be used, and no other expression would supply its place.<sup>63</sup> A common-law exchange, answering to the foregoing requirements, probably never occurs in modern practice.

### § 376. Conveyances operating under the Statute of Uses.

The Statute of Uses, as has been previously explained, gave rise to two entirely new methods of transferring legal estates in land, to-wit, the conveyance by “bargain and sale,” and that by “covenant to stand seised”; the former being based upon a use raised in the intended grantee by the payment of a pecuniary consideration, usually merely nominal,

<sup>59</sup> Litt. §§ 62, 63; Co. Litt. 50a.

<sup>60</sup> 29 Car. II. c. 3, §§ 1-3; Co. Litt. 50a, Butler's note. See *Dowling v. McKenney*, 124 Mass. 478; *Cass v. Thompson*, 1 N. H. 65, 8 Am. Dec. 36; *Rice v. Peet*, 15 Johns. (N. Y.) 503.

<sup>61</sup> Co. Litt. 50b.

<sup>62</sup> Litt. §§ 64, 65; Co. Litt. 51a; 2 Bl. Comm. 323; *Anonymous*, 3 Salk. 157; *Windsor v. Collinson*, 32 Or. 297; *Long v. Fuller*, 21 Wis. 121.

<sup>63</sup> Co. Litt. 51b; 2 Bl. Comm. 323; *Eton College v. Winchester*, 3 Wils. 468; *Cass v. Thompson*, 1 N. H. 65, 8 Am. Dec. 36; *Dean v. Shelly*, 57 Pa. St. 426, 98 Am. Dec. 235; *Windsor v. Collinson*, 32 Or. 297.

and the latter being based on the raising of a use by a covenant, in favor of one related by blood or marriage, to hold the title for the use of the latter, the statute executing the use in both cases.<sup>64</sup> Since the effect of this statute was to enable the owner of land, by a mere contract of sale, upon the payment of a pecuniary consideration, to vest the legal title in another, without any writing or ceremony whatever, and with absolute secrecy, a statute was passed in the same year, called the "Statute of Enrollments,"<sup>65</sup> requiring all bargains and sales of freehold interests, in order to be valid, to be made by deed,—that is, a writing under seal, enrolled in court, or with certain officials. The statute did not apply to conveyances by covenant to stand seised. This statute has usually been regarded as not in force in this country.<sup>66</sup> Clandestine conveyances by bargain and sale being thus prevented by the Statute of Enrollments, conveyancers, soon after the statute, devised the conveyance by "lease and release," taking advantage of the fact that the statute required the enrollment of bargains and sales of "freehold" interests only. This conveyance, as before explained, consisted of a bargain and sale of a leasehold interest to the intended grantee, which vested him with the legal possession, and this was followed by a deed of release of the reversion remaining in the former owner.<sup>67</sup>

### § 377. Conveyances employed in the United States.

In most of the states of this country there are statutory provisions authorizing the transfer of land by simple forms

<sup>64</sup> See ante, § 88.

<sup>65</sup> 27 Hen. VIII. c. 16 (A. D. 1535). See 2 Sanders, Uses & Trusts (5th Ed.) 64.

<sup>66</sup> See *Givan v. Tout*, 7 Blackf. (Ind.) 210. *Marshall v. Fisk*, 6 Mass. 24, 4 Am. Dec. 76.

<sup>67</sup> 1 Hayes, Conveyancing (5th Ed.) 76. See ante, § 88.

of conveyance,<sup>68</sup> which, in their operation, much resemble the common-law "grant," except that they are not confined to incorporeal things. The same purpose of simplification of conveyancing has in England been attained by a statute providing that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant, as well as in livery.<sup>69</sup>

Conveyances by way of bargain and sale have, however, been in constant use in this country,<sup>70</sup> and, even in states where there are statutory provisions of the character referred to, the words "bargain and sell" are ordinarily used in a conveyance. In such states, in fact, it is difficult, and for most, if not all, purposes, unimportant, to say whether a particular conveyance operates by force of the Statute of Uses or under the local statute. In order, however, that a conveyance be regarded as taking effect by way of bargain and sale, it must, as was before stated, be supported by a valuable consideration.<sup>71</sup>

Conveyances by way of covenant to stand seised are recognized in this country,<sup>72</sup> but, since a consideration of blood or marriage is necessary,<sup>73</sup> there is but little opportunity for

<sup>68</sup> 1 Stimson's Am. St. Law, §§ 1480-1482.

<sup>69</sup> "Real-Property Act," St. 8 & 9 Vict. c. 106, § 2 (A. D. 1845).

<sup>70</sup> See *Pascault v. Cochran* (C. C.) 34 Fed. 358; *Givan v. Tout*, 7 Blackf. (Ind.) 210; *Nelson v. Davis*, 35 Ind. 474; *Chiles v. Conley's Heirs*, 2 Dana (Ky.) 21; *Sanders v. Hartzog*, 6 Rich. (S. C.) 479; *Holland v. Rogers*, 33 Ark. 251.

<sup>71</sup> *Corwin v. Corwin*, 6 N. Y. 342, 57 Am. Dec. 453; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Lambert v. Smith*, 9 Or. 185; *Den d. Jackson v. Hampton*, 30 N. C. 457; *Gault v. Hall*, 26 Me. 561; *Boardman v. Dean*, 34 Pa. St. 252.

<sup>72</sup> *Jackson v. Swart*, 20 Johns. (N. Y.) 85; *Ward v. Wooten*, 75 N. C. 413; *Sprague v. Woods*, 4 Watts & S. (Pa.) 192; *Fisher v. Strickler*, 10 Pa. St. 348, 51 Am. Dec. 488; *Watson v. Watson*, 24 S. C. 228, 58 Am. Rep. 247; *Barry v. Shelby*, 4 Hayw. (Tenn.) 229.

<sup>73</sup> *Rollins v. Riley*, 44 N. H. 9; *Jackson v. Caldwell*, 1 Cow. (N. Y.) 622; *Gault v. Hall*, 26 Me. 561; *Thompson v. Thompson*, 17 (860)



their employment. Even when the proper consideration does exist, a conveyance in form under the local statute, or by way of bargain and sale, with a recital of a pecuniary consideration, would usually be employed.

Conveyances by lease and release have never been employed to any extent in this country, since the Statute of Enrollments, which constituted the reason for their use in England, is not in force here.

—“Quitclaim deeds.”

There is, in this country, a well-recognized class of conveyances, known as “quitclaim deeds,” which are to some extent a development of the common-law release, and which have acquired their name from one of the words ordinarily used in the latter instrument.<sup>74</sup> Such a conveyance purports merely to convey whatever title to the particular land the grantor may have, and its use excludes any implication that he has a good title, or any title at all.<sup>75</sup> It necessarily, therefore, contains no covenants for title, and its employment is, in some states, regarded as in itself notice to the purchaser of possible defects in the title, so that he cannot claim to occupy the position of a *bona fide* purchaser.<sup>76</sup> A quitclaim,

Ohio St. 649; Doe d. Cobb v. Hines, 44 N. C. 343, 59 Am. Dec. 559; 2 Sanders, Uses & Trusts (5th Ed.) 98. Contra in Massachusetts. Trafton v. Hawes, 102 Mass. 533, 3 Am. Rep. 494. See ante, § 134.

<sup>74</sup> See, as to the early use of the word “quitclaim,” 2 Pollock & Maitland, Hist. Eng. Law, 91.

<sup>75</sup> City & County of San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Kerr v. Freeman, 33 Miss. 292; Emmel v. Headlee (Mo.) 7 S. W. 22; Coe v. Persons Unknown, 43 Me. 432; Garrett v. Christopher, 74 Tex. 453, 15 Am. St. Rep. 850

<sup>76</sup> See post, § 482.

Since a government patent, when issued, relates back to the date of the entry, it inures to the benefit of one to whom the patentee has, since the entry, conveyed the land, even though by a “quitclaim” purporting to convey merely such title as he has. Crane v. Salmon, 41 Cal. 63; Welch v. Dutton, 79 Ill. 466; Callahan v. Davis,

however, is sufficient in itself to pass the grantor's existing title to the same extent as a deed of grant or bargain and sale,<sup>77</sup> and its validity is not, like the common-law release, dependent upon the existence of an estate or interest in the grantee.<sup>78</sup> The question whether a conveyance is a mere quitclaim is determined by a construction of the instrument as a whole, with reference to the circumstances under which it was given.<sup>79</sup>

**§ 378. Conveyances failing to take effect in the manner intended.**

A conveyance which is intended to take effect as a certain class of conveyance, if not valid for that purpose, will, if possible, be construed as a conveyance of another character, in order that it may take effect.<sup>80</sup> This important rule has been applied in numerous connections. For instance, a conveyance intended to take effect as a bargain and sale, but which is void as such for want of a pecuniary consideration, will take effect as a covenant to stand seised, if a considera-

90 Mo. 78; *Landes v. Brant*, 10 How. (U. S.) 372; *French's Lessee v. Spencer*, 21 How. (U. S.) 228.

<sup>77</sup> *Bradbury v. Davis*, 5 Colo. 265; *Kyle v. Kavanagh*, 103 Mass. 356; *Grant v. Bennett*, 96 Ill. 513; *Wilson v. Albert*, 89 Mo. 537; *McInerney v. Peck*, 10 Wash. 515. So by statute in some states. See *Hoffman v. Harrington*, 28 Mich. 90; *Kerr v. Freeman*, 33 Miss. 292.

<sup>78</sup> *Spaulding v. Bradley*, 79 Cal. 449; *Kerr v. Freeman*, 33 Miss. 292.

<sup>79</sup> See *United States v. California & Oregon Land Co.*, 148 U. S. 31; *Derrick v. Brown*, 66 Ala. 162; *Reynolds v. Shaver*, 59 Ark. 299; *Wightman v. Spofford*, 56 Iowa, 145; *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304; *Cummings v. Dearborn*, 56 Vt. 441; *Morrison v. Wilson*, 30 Cal. 344.

<sup>80</sup> *Elphinstone*, Interpret. of Deeds, 40, citing the numerous English cases. *Goodtitle v. Bailey*, Cowp. 600; *Roe d. Wilkinson v. Tranmer*, Willes, 682, 1 Gray's Cas. 494; *Foster's Lessee v. Dennison*, 9 Ohio, 121; *Hunt v. Hunt*, 14 Pick. (Mass.) 374.

tion of blood or marriage exists;<sup>81</sup> and, as before stated, a conveyance in words of release, void as such for want of an estate or possession in the releasee, will be supported as a conveyance by bargain and sale, or otherwise.<sup>82</sup> This principle has also been adopted to support limitations of future estates which could not be supported unless the conveyance were regarded as operating under the Statute of Uses.<sup>83</sup>

## II. FORM AND ESSENTIALS OF A CONVEYANCE.

A conveyance must identify the parties thereto and the land conveyed, and must contain words showing an intention that it is to transfer rights in the land. It must also be properly executed. It frequently, moreover, contains words limiting the estate to be taken by the grantee; and may likewise contain a reservation creating new rights in the land in favor of the grantor, such as easements or rights of profit.

No consideration is necessary to the validity of a conveyance not operating under the Statute of Uses. The conveyance may be set aside if induced by fraud or duress, or, in some cases, if executed under a mistake.

### § 379. General considerations.

All conveyances of freehold or leasehold interest in lands, other than certain leases for three years or less, must, by the Statute of Frauds, be in writing.<sup>84</sup> In most if not all the states of this country there are statutes to the same effect<sup>85</sup>

<sup>81</sup> *Crossing v. Scudamore*, 2 Lev. 9, 1 Mod. 175; *Horton v. Sledge*, 29 Ala. 478; *Bank of United States v. Housman*, 6 Paige (N. Y.) 526; *Eckman v. Eckman*, 68 Pa. St. 460.

<sup>82</sup> See ante, note 33.

<sup>83</sup> *Roe d. Wilkinson v. Tranmer*, 2 Wils. 75, Willes, 682, 1 Gray's Cas. 494; *Ward v. Wooten*, 75 N. C. 413; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147.

<sup>84</sup> 29 Car. II. c. 3, §§ 1-3.

<sup>85</sup> 1 Stimson's Am. St. Law, §§ 1560, 4143.

These statutes do not, however, as before stated, interfere with surrenders by operation of law.<sup>86</sup>

At common law, all written conveyances of land, as well as most other written instruments, were in the form of deeds,—that is, of instruments under seal,—and a deed was either a “deed of indenture” or a “deed poll.” A deed of indenture was a deed made between two or more persons, while a deed poll was made by one person only.<sup>87</sup> These terms are thus used in England at the present day, and they are occasionally so used in this country.

A carefully drawn conveyance usually consists of the following parts: At the commencement the names of the parties are stated,<sup>88</sup> and the date is sometimes here given, though it is frequently placed at the end. Next come the recitals, if there are any, these being statements of fact explanatory of the transaction. A statement of the consideration and of its payment and receipt then follow,<sup>89</sup> and, after this, the operative words of conveyance,<sup>90</sup> with a description of the land conveyed,<sup>91</sup> and any exception therefrom.<sup>92</sup> The parts thus far enumerated constitute what is known as “the premises.” The premises are followed by the “habendum,” which limits the estate to be taken by the grantee, and is usually

<sup>86</sup> See ante, § 375.

<sup>87</sup> Co. Litt. 229a. The word “indenture” originated in the fact that two copies of the deed were usually written on the same piece of parchment, with some word or letters written between them, through which the parchment was cut in an indented or waving line. The words “deed poll” refer to a deed “polled” or shaven at the top. Subsequently, conveyancers adopted the practice, which still, it seems, prevails in England, of cutting all deeds between two or more parties in a waving line at the top. 2 Bl. Comm. 296; Williams, Real Prop. (18th Ed.) 150.

<sup>88</sup> Post, § 380.

<sup>89</sup> Post, § 384.

<sup>90</sup> Post, § 381.

<sup>91</sup> Post, §§ 387-392.

<sup>92</sup> Post, § 383.

introduced by the words "to have and to hold."<sup>93</sup> Any declaration of trust which is sought to be made is here inserted. The "reddendum" or reservation<sup>94</sup> then follows, after that the statement of any condition or power affecting the grant, and then the covenant or covenants of title.<sup>95</sup> The conclusion usually consists of a formal reference to the execution, and the signatures and seals of the parties are then placed by them at the foot of the instrument.<sup>96</sup> There is also, almost invariably, a certificate by an officer that the conveyance was acknowledged by the grantors.<sup>97</sup>

Though a well-drawn conveyance usually contains all or most of these parts above referred to, a conveyance containing merely the names of the parties and words of conveyance, with a description of the land, if duly executed, is sufficient to vest at least an estate for life in the grantee.<sup>98</sup>

### § 380. Designation of the parties.

A conveyance should designate with certainty the name of the grantor, and this should regularly be done at the commencement. It is sufficient, however, if the name as given is sufficient to enable the grantor to be identified, and the fact that his name as it appears in the instrument differs from his actual name, or from the name signed thereto, does not invalidate the conveyance.<sup>99</sup> A conveyance by the "heirs"

<sup>93</sup> Post § 382.

<sup>94</sup> Post, § 383.

<sup>95</sup> Post, §§ 394-401.

<sup>96</sup> Post, §§ 402, 403.

<sup>97</sup> Post, § 405.

<sup>98</sup> Co. Litt. 7a; 4 Kent's Comm. 461.

<sup>99</sup> Comyn's Dig. "Fait" (E 3); *Ersine v. Davis*, 25 Ill. 251; *Nicomemus v. Young*, 90 Iowa, 423; *Houx v. Batteen*, 68 Mo. 84; *Rupert v. Penner*, 35 Neb. 587; *Jenkins v. Jenkins*, 148 Pa. St. 216; *Bierer v. Fretz*, 32 Kan. 329.



of a decedent is sufficient, provided such heirs can be identified.<sup>100</sup>

It is generally held that, when two or more persons join in the execution of a conveyance, only such as are named in the body of the instrument will be regarded as parties thereto. This rule has usually been applied in the cases of conveyances by a husband, the joinder in the execution of which by the wife has been held to be insufficient to release her dower, or otherwise divest her rights;<sup>101</sup> but the rule is applicable, for even stronger reasons, it would seem, in the case of strangers joining in the execution.<sup>102</sup> The same necessity that the grantor be named in the conveyance does not exist, it would seem, in the case of a conveyance executed by and purporting to be the act of one person only, since the name of the grantor is put in "but to make certainty of the grantor,"<sup>103</sup> and there

<sup>100</sup> *Blaisdell v. Morse*, 75 Me. 542.

<sup>101</sup> *Payne v. Parker*, 10 Me. 178, 25 Am. Dec. 221; *Stevens v. Owen*, 25 Me. 94; *Lothrop v. Foster*, 51 Me. 367; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56, 3 Gray's Cas. 621; *Leavitt v. Lamprey*, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; *Greenough v. Turner*, 11 Gray (Mass.) 334; *Prather v. McDowell*, 8 Bush (Ky.) 46; *Agricultural Bank of Mississippi v. Rice*, 4 How. (U. S.) 225; *Batchelor v. Brereton*, 112 U. S. 396; *Cox v. Wells*, 7 Blackf. (Ind.) 410, 43 Am. Dec. 98; *Merrill v. Nelson*, 18 Minn. 366 (Gil. 335); *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65; *Laughlin v. Fream*, 14 W. Va. 322; *Harrison v. Simons*, 55 Ala. 510. Contra, *Armstrong v. Stovall*, 26 Miss. 275; *Johnson v. Montgomery*, 51 Ill. 185; *Ingoldsby v. Juan*, 12 Cal. 564; *Elliot v. Sleeper*, 2 N. H. 525; *Woodward v. Leaver*, 38 N. H. 29. In *Burge v. Smith*, 27 N. H. 332, a release of dower by the mere execution by the wife of the husband's deed is upheld, on the ground that, in that state, a contrary decision would overthrow many titles, but that this holding is wrong in principle is strongly asserted.

<sup>102</sup> *Harrison v. Simons*, 55 Ala. 510. See *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65; *Batchelor v. Brereton*, 112 U. S. 396. Contra, *Hrouska v. Janke*, 66 Wis. 252.

<sup>103</sup> *Perkins*, § 36.

can, in such a case, be no question that the person executing the conveyance is the grantor therein.<sup>104</sup>

The grantee or grantees must be named in the conveyance, or means for their identification furnished thereby.<sup>105</sup> A conveyance to a deceased person is invalid;<sup>106</sup> but a conveyance to the heirs of one deceased is sufficient, since their identity can be determined.<sup>107</sup> On the other hand, one cannot convey land to the heirs of a living person, since they are incapable of identification.<sup>108</sup>

— Name of grantee left blank.

At the common law, a deed,—that is, an instrument under seal,—if delivered with a blank therein as to an essential part, is void, although this blank be afterwards filled by one having parol authority from the maker of the deed so to do; this being based on the theory that an authority to make an instrument under seal must itself be under seal.<sup>109</sup> Apply-

<sup>104</sup> *Elliot v. Sleeper*, 2 N. H. 525. But see, to the contrary, *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486.

So it would seem that a conveyance in the first person, though not naming the grantor, if signed by him, would be sufficient to divest his title. Such a conveyance was upheld, without any question as to this particular point, in *Jackson v. Root*, 18 Johns. (N. Y.) 60; *Hutchins v. Carleton*, 19 N. H. 487.

<sup>105</sup> *Wunderlin v. Cadogan*, 50 Cal. 613; *Wood v. Boyd*, 28 Ark. 75; *Simmons v. Spratt*, 20 Fla. 495; *Hardin v. Hardin*, 32 S. C. 599; *Wright v. Lancaster*, 48 Tex. 250; *Chase v. Palmer*, 29 Ill. 306. See, as to conveyance to one under assumed name, *Thomas v. Wyatt*, 31 Mo. 188, *Finch's Cas.* 1075.

<sup>106</sup> *Lewis v. McGee*, 1 A. K. Marsh. (Ky.) 199.

<sup>107</sup> *Shaw v. Loud*, 12 Mass. 447; *Hoover v. Malen*, 83 Ind. 195; *Boone v. Moore*, 14 Mo. 421; *Gearheart v. Tharp*, 9 B. Mon. (Ky.) 31.

<sup>108</sup> *Booker v. Tarwater*, 138 Ind. 385; *Morris v. Stephens*, 46 Pa. St. 200; *Hall v. Leonard*, 1 Pick. (Mass.) 27. But otherwise if the word "heirs" means children. *Huss v. Stephens*, 51 Pa. St. 282; *Tharp v. Yarbrough*, 79 Ga. 382, 11 Am. St. Rep. 439.

<sup>109</sup> *Sheppard's Touchstone*, 54; *Comyn's Dig.* "Fait" (A 1); *Hibblewhite v. McMorine*, 6 Mees. & W. 200.

ing this rule, it has been held, in a number of states, that a conveyance under seal, with the name of the grantee left blank, is invalid, although the blank is afterwards filled up by another person acting under a parol authority from the grantor.<sup>110</sup> In other states, it has been held, without reference to the question of a seal, that an authority to insert the grantee's name must be in writing.<sup>111</sup> In a majority of states, however, at the present time, the name of the grantee, if left blank, may be inserted, in the grantor's absence, by one acting under oral authority from him, upon the ground of the technical character of the rule to the contrary, based, as it is, on the sanctity accorded at common law to the presence of a seal.<sup>112</sup> But even under this view, the name of the grantee must be inserted before the delivery of the conveyance to him,—that is, though the grantor may commit the instrument to his agent, to fill in the blank and then deliver it, one to whom the instrument is delivered by the grantor cannot insert his own name as grantee, though this is within the terms of his authority.<sup>113</sup>

<sup>110</sup> *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549; *Preston v. Hull*, 23 Grat. (Va.) 600; *Davenport v. Sleight*, 19 N. C. 381; *Burns v. Lynde*, 6 Allen (Mass.) 305.

<sup>111</sup> *Ayres v. Probasco*, 14 Kan. 175; *Adamson v. Hartman*, 40 Ark. 58; *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266. See *Lindsley v. Lamb*, 34 Mich. 509.

<sup>112</sup> *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Cribben v. Deal*, 21 Or. 211, 28 Am. St. Rep. 746; *Threadgill v. Butler*, 60 Tex. 599; *Inhabitants of South Berwick v. Huntress*, 53 Me. 90; *Lafferty v. Lafferty*, 42 W. Va. 783; *Schintz v. McManamy*, 33 Wis. 299.

But when the instrument must be executed by the grantor, and cannot be executed through an agent, as in some states is the case in a conveyance by a married woman, blanks in the conveyance cannot be filled by a third person acting under oral, or even sealed, authority. *Drury v. Foster*, 2 Wall. (U. S.) 24.

<sup>113</sup> See *Allen v. Withrow*, 110 U. S. 119; *McClung v. Steen* (C. C.) 32 Fed. 373; *Cribben v. Deal*, 21 Or. 211, 28 Am. St. Rep. 746 (semble); *Bell v. Kennedy*, 100 Pa. St. 215. See *Chauncey v. Arnold*, (868)

Even though the sufficiency of an oral authority for this purpose be denied, it is generally held that, as against a grantee who accepts the conveyance with his name appearing therein in its proper place, and who does not know of its insertion by the agent, the grantor is estopped to deny the validity of the conveyance.<sup>114</sup> Apart from such cases of estoppel, and without reference to the common-law requirement of a sealed authority, the statutory requirement existing in some states, that a conveyance be signed by the grantor, or by an agent authorized in writing, would apparently prevent the insertion of such an essential part of the conveyance, after its execution, by a person acting under a merely oral authority.

### § 381. Words of conveyance.

Though particular words are appropriate to particular classes of conveyances, it is not necessary that these particular technical terms be used, and the conveyance is valid, provided it contains any words signifying an intention to transfer the land or the grantor's interest therein.<sup>115</sup> The phrase "give, grant, bargain, and sell" is frequently employed, and is no doubt sufficient for any class of conveyance, in view of the rule before referred to, that a conveyance will be upheld if possible, though it cannot operate as intended. It is nec-

24 N. Y. 330. But see, to the contrary, *Threadgill v. Butler*, 60 Tex. 599.

<sup>114</sup> *Phelps v. Sullivan*, 140 Mass. 36; *Pence v. Arbuckle*, 22 Minn. 417; *State v. Matthews*, 44 Kan. 596; *Garland v. Wells*, 15 Neb. 298; *Quinn v. Brown*, 71 Iowa, 376. Contra, *Upton v. Archer*, 41 Cal. 85.

<sup>115</sup> *Shove v. Pincke*, 5 Term R. 124; *San Francisco & O. R. Co. v. City of Oakland*, 43 Cal. 502; *Gordon v. Haywood*, 2 N. H. 402; *Hutchins v. Carleton*, 19 N. H. 487; *Jackson v. Root*, 18 Johns. (N. Y.) 60; *Lynch v. Livingston*, 6 N. Y. 422; *Folk v. Varn*, 9 Rich. Eq. (S. C.) 303; *Howe v. Warnack*, 4 Bibb (Ky.) 234; *Evenson v. Webster*, 3 S. D. 382, 44 Am. St. Rep. 802.

essary, however, that the conveyance contain words showing an intention to transfer the grantor's interest,<sup>116</sup> and the words "sign over"<sup>117</sup> and "warrant and defend" have been held to be insufficient.<sup>118</sup>

### § 382. The habendum.

The purpose of the habendum is, as before stated, to limit the estate to be taken by the grantee. In its construction, in connection with other parts of the conveyance, the purpose is, of course, to arrive at the intention of the parties,<sup>119</sup> and, if possible, it will be construed so as to harmonize with the premises, thus giving effect to both.<sup>120</sup>

In the case of a clear repugnancy between the premises and the habendum, the premises will prevail to the extent that an estate created in the granting clause cannot be cut down or invalidated by limitations in the habendum.<sup>121</sup> If the estate limited in the habendum, however, is greater than

<sup>116</sup> *Webb v. Mullins*, 78 Ala. 111; *Bell v. McDuffie*, 71 Ga. 264; *Brown v. Manter*, 21 N. H. 528, 53 Am. Dec. 223.

<sup>117</sup> *McKinney v. Settles*, 31 Mo. 541, *Finch's Cas.* 1080.

<sup>118</sup> *Hummelman v. Mounts*, 87 Ind. 178.

<sup>119</sup> *Higgins v. Wasgatt*, 34 Me. 305; *Ratliffe v. Marrs*, 87 Ky. 26; *Barnett v. Barnett*, 104 Cal. 298; *Smith v. Smith*, 71 Mich. 633.

<sup>120</sup> *Co. Litt.* 183b; *Edwards v. Beall*, 75 Ind. 401; *Warn v. Brown*, 102 Pa. St. 347.

<sup>121</sup> *Co. Litt.* 299a; 2 *Sanders, Uses & Trusts*, 155; *Challis, Real Prop.* 333; *Boddington v. Robinson*, L. R. 10 Exch. 270; *Robinson v. Payne*, 58 Miss. 690; *Adams v. Dunklee*, 19 Vt. 382; *Smith v. Smith*, 71 Mich. 633; *Fowler v. Black*, 136 Ill. 363; *Ratliffe v. Marrs*, 87 Ky. 26; *Winter v. Gorsuch*, 51 Md. 180. Contra, *Higgins v. Wasgatt*, 34 Me. 305, in which a contrary intention was inferred, "taking the whole instrument into consideration." Compare *Berridge v. Glassey*, 112 Pa. St. 442, 56 Am. Rep. 322.

But the limitations in the habendum will control if there is in the premises an express reference to the "limitations hereinafter set forth," or similar expressions. *Tyler v. Moore*, 42 Pa. St. 374.

Although the grant in the premises be to A. and his "heirs," the habendum may show that a fee tail only is created, this being regarded, not as abridging the estate granted, but as merely a quali-



that named in the premises, the habendum will prevail.<sup>122</sup> So, an estate granted to A. for life may, by the habendum, be enlarged to a fee simple.

If there is no express limitation of an estate in the premises, the grant being simply to A., the habendum may determine the quantum of the estate granted. Thus, at common law, though such a grant without words of limitation creates an estate for life only in the grantee, it may be shown, by the habendum, that an estate in fee or for years is intended;<sup>123</sup> and where, under the modern statutes in force in many states,<sup>124</sup> a grant to A. creates a fee simple, or passes whatever estate the grantor may have, the habendum may show that an estate for life only is intended to be conveyed.<sup>125</sup>

The fact that the habendum mentions as grantees not only the person or persons named in the premises, but also another person, does not make this latter person a joint grantee

fication of the word "heirs" as first used. Co. Litt. 21a; Challis, Real Prop. 335; Turnman v. Cooper, Cro. Jac. 476; Altham's Case, 8 Coke, 154b. To the same effect, see Hunter v. Patterson, 142 Mo. 310. A conveyance to A. and the heirs of his body, habendum to him and his heirs forever, gives A. an estate tail, probably with a fee simple expectant. Co. Litt. 21a and Hargrave's note; Corbin v. Healy, 20 Pick. (Mass.) 514; Challis, Real Prop. 335.

<sup>122</sup> Co. Litt. 21a, 299a; 2 Sanders, Uses & Trusts (5th Ed.) 156; Elphinstone, Interpret. of Deeds, 218; Goodtitle v. Gibbs, 5 Barn. & C. 709.

<sup>123</sup> Co. Litt. 183a; Altham's Case, 8 Coke, 154b; Challis, Real Prop. 334; Berry v. Billings, 44 Me. 416, 69 Am. Dec. 107; McLeod v. Tarrant, 39 S. C. 271; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365, Finch's Cas. 926; Phillips v. Thompson, 73 N. C. 543.

<sup>124</sup> See ante, 20.

<sup>125</sup> Montgomery v. Sturdivant, 41 Cal. 290; Bodine's Adm'rs v. Arthur, 91 Ky. 53, 34 Am. St. Rep. 162; Riggin v. Love, 72 Ill. 553; Kelly v. Hill (Md.) 25 Atl. 919; Doren v. Gillum, 136 Ind. 134; Baskett v. Sellars, 93 Ky. 2.

with the others, though it may enable him to take by way of remainder.<sup>126</sup>

### § 383. Exceptions and reservations.

The purpose and effect of an exception in a conveyance is to except or exclude from the operation of the conveyance some part of the thing or things covered by the general words of description therein, as when one conveys a piece of land, excepting a certain part thereof, or the houses thereon, it being always of a thing actually existent.<sup>127</sup> A reservation, on the contrary, as defined by the common-law writers, is a clause by which the grantor reserves to himself some new thing "issuing out of" the thing granted, and not *in esse* before. At common law, the term is applicable only to the reservation of a rent or some other service of a feudal nature.<sup>128</sup>

An exception must be of part of the thing granted,<sup>129</sup> and must not be as extensive as such thing, so as to be repugnant thereto.<sup>130</sup> Nor is it valid if it was previously specifically granted, as when, after granting twenty houses, one of such

<sup>126</sup> Elphinstone, Interpret. of Deeds, 214; Samme's Case, 13 Coke, 54; Sheppard's Touchstone (Preston's Ed.) 237; Blair v. Osborne, 84 N. C. 417; Moore v. City of Waco, 85 Tex. 206. See Hafner v. Irwin, 20 N. C. 433, 34 Am. Dec. 390. Contra, McLeod v. Tarrant, 39 S. C. 271.

<sup>127</sup> Co. Litt. 21a; Sheppard's Touchstone, 77 et seq.; Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co. (C. C.) 13 Fed. 646. See Brown v. Allen, 43 Me. 590; King v. Wells, 94 N. C. 344; Woodcock v. Estey, 43 Vt. 515; Truett v. Adams, 66 Cal. 218.

<sup>128</sup> Co. Litt. 47a; Sheppard's Touchstone, 80; Doe d. Douglas v. Lock, 2 Adol. & E. 743; Durham & S. Ry. Co. v. Walker, 2 Q. B. 940.

<sup>129</sup> Sheppard's Touchstone, 78; Moore v. Lord, 50 Miss. 229; Cornell v. Todd, 2 Denio (N. Y.) 130.

<sup>130</sup> Dorrell v. Collins, Cro. Eliz. 6; Shoenberger v. Lyon, 7 Watts & S. (Pa.) 184; Young's Petition, 11 R. I. 636. Compare Foster v. Runk, 109 Pa. St. 291, 58 Am. Rep. 720; Adams v. Warner, 23 Vt. 395.

houses is sought to be excepted.<sup>131</sup> The part excepted must be described with such certainty that it may be identified, or the exception is void.<sup>132</sup> There may be an exception, not only of a particular piece of land measured horizontally, but also of houses or other fixtures on the land conveyed,<sup>133</sup> or of timber growing thereon,<sup>134</sup> or of minerals therein.<sup>135</sup>

Since an exception is in effect merely a part of the description of the thing granted, the subject of the exception remains in the grantor, as before the conveyance, and no words of inheritance or other words of limitation are necessary in order that the grantor may retain the same estate in the thing excepted as he had before. A reservation, on the other hand, since it creates a thing not before *in esse*, must contain words of inheritance, in jurisdictions where the common-law rule has not been changed by statute.<sup>136</sup> An exception, from its nature, always operates in favor of the grantor, and a reservation likewise, it has long been settled, cannot operate in favor

<sup>131</sup> Sheppard's Touchstone (Preston's Ed.) 78; 4 Kent's Comm. 468.

<sup>132</sup> Mooney v. Cooledge, 30 Ark. 640; Andrews v. Todd, 50 N. H. 565; Den d. Waugh v. Richardson, 30 N. C. 470; Stambaugh v. Hollabaugh, 10 Serg. & R. (Pa.) 357; Butcher v. Creel's Heirs, 9 Grat. (Va.) 201.

<sup>133</sup> Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co. (C. C.) 13 Fed. 646; Sanborn v. Hoyt, 24 Me. 118. See ante, § 236.

<sup>134</sup> Sheppard's Touchstone, 78; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Howard v. Lincoln, 13 Me. 122; Putnam v. Tuttle, 10 Gray (Mass.) 48.

<sup>135</sup> Snoddy v. Bolen, 122 Mo. 479; Sloan v. Lawrence Furnace Co., 29 Ohio St. 568; Whitaker v. Brown, 46 Pa. St. 197.

<sup>136</sup> Co. Litt. 47a, 215b; Ashcroft v. Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672, 3 Gray's Cas. 587; Whitaker v. Brown, 46 Pa. St. 197; Emerson v. Mooney, 50 N. H. 318, 3 Gray's Cas. 579; Smith v. Ladd, 41 Me. 314. See Keeler v. Wood, 30 Vt. 242. In some of the earlier Massachusetts cases there are erroneous statements that words of inheritance are necessary in the case of an exception. Curtis v. Gardner, 13 Metc. (Mass.) 457, 3 Gray's Cas. 548; Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen (Mass.) 159, 170.

of a person other than the grantor,<sup>137</sup> this rule being presumably due to the feudal origin and purpose of a reservation, as formerly understood.

Such being the natures of an exception and a reservation at common law, neither was appropriate for the creation, on the conveyance of land, of an easement or right of profit in the land in favor of the grantor, and, accordingly, the English courts have decided that such an attempted exception or reservation must be construed as a grant back of an easement by the grantee of the land.<sup>138</sup> In this country, however, an entirely different view has been taken, and an easement is invariably regarded as the proper subject of a reservation,<sup>139</sup> and sometimes even of an exception.<sup>140</sup>

The adoption in this country of the rule that a right of use or profit may be thus created by a reservation seems not to involve a great extension of the common-law principle that a reservation is proper for the creation of a new right not before existent, and such a rule is rendered almost a necessity by the fact that here the conveyance is usually executed by the

<sup>137</sup> Sheppard's Touchstone, 80; *Ives v. Van Auken*, 34 Barb. (N. Y.) 566; *Young's Petition*, 11 R. I. 636; *Strasson v. Montgomery*, 32 Wis. 52; *Herbert v. Pue*, 72 Md. 307; *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 73; *Murphy v. Lee*, 144 Mass. 371; *Bridger v. Pierson*, 45 N. Y. 601; *Hill v. Lord*, 48 Me. 83. But see *Hodge v. Boothby*, 48 Me. 68.

But in England, where the reservation of an easement takes effect as a re-grant, an easement may be created in favor of one not a party to the conveyance, if the conveyance is executed by the grantee. *Wickham v. Hawker*, 7 Mees. & W. 63.

<sup>138</sup> Ante, § 316.

<sup>139</sup> *Chappell v. New York, N. H. & H. R. Co.*, 62 Conn. 195; *Hagerty v. Lee*, 50 N. J. Eq. 464; *Clafin v. Boston & A. R. Co.*, 157 Mass. 489; *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533; *Kister v. Reeser*, 98 Pa. St. 1, 42 Am. Rep. 608. And see cases in notes 140-144.

<sup>140</sup> *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307, 3 Gray's Cas. 562; *Ring v. Walker*, 87 Me. 550; *Clafin v. Boston & A. R. Co.*, 157 Mass. 489.



grantor alone, so that the effect of viewing the reservation as a grant back, as is done by the courts in England, where the grantee almost invariably executes the instrument, would usually be to render such a stipulation entirely invalid. It is perhaps unfortunate, however, that an exception, the proper function of which is to particularize the description of the corporeal thing, an estate in which is conveyed, should be utilized for the entirely different purpose of creating an incorporeal thing. Some of the courts have adopted an ingenious distinction between a stipulation in favor of the grantor for an easement corresponding to a *quasi* easement, already existing, and one for an easement not corresponding to a pre-existing *quasi* easement; holding that the former is properly an exception, as being of a thing actually existent, while the latter is a reservation, as being of something not before existent.<sup>141</sup>

In construing conveyances thus creating, or attempting to create, rights in the land granted in favor of the grantor, the courts ignore the terms used, such as "except" and "reserve," and construe the language as an exception or a reservation, according to the nature of the rights sought to be created.<sup>142</sup>

<sup>141</sup> *White v. New York & N. E. R. Co.*, 156 Mass. 181; *Claffin v. Boston & A. R. Co.*, 157 Mass. 489; *Simpson v. Boston & M. R. R.*, 176 Mass. 359; *Bridger v. Pierson*, 45 N. Y. 601. See *Chappell v. New York, N. H. & H. R. Co.*, 62 Conn. 195.

This distinction seems somewhat artificial, since a quasi easement consists merely in the exercise of a right of user incident to the ownership of land, which may sometimes have certain results as raising an implication of a grant (see ante, § 317), but which does not in itself constitute a right recognized by the law, and there is as much a creation of a new and distinct legal right by the "exception" of an easement corresponding to such quasi easement as in the case of a "reservation" of a right of use or profit not before exercised.

<sup>142</sup> *State v. Wilson*, 42 Me. 9; *Engel v. Ayer*, 85 Me. 453; *Sloan v. Lawrence Furnace Co.*, 29 Ohio St. 568; *Whitaker v. Brown*, 46 Pa.



In some of the states in which the word "heirs" is still necessary to create an estate in fee, the question whether the language of the conveyance is to be construed as an exception or a reservation may have important results in determining whether the grantor has an easement in fee or for life only.<sup>143</sup> In others of such states, however, the courts have refused to apply the requirement of words of inheritance to the case of such a reservation of an easement, it being considered that, if this is evidently intended to be for the benefit of land retained by the grantor, he will have an easement of like duration with his estate in such land.<sup>144</sup>

### § 384. Consideration.

A conveyance is not, properly speaking, a contract, though it is the result of agreement, and a consideration is not necessary to its validity, as in the case of a contract, except when the conveyance is one operating under the Statute of Uses.<sup>145</sup>

St. 197; *White v. New York & N. E. R. Co.*, 156 Mass. 181; *Coal Creek Min. Co. v. Heck*, 15 Lea (Tenn.) 497; *Watkins v. Tucker*, 84 Tex. 428; *Hagerty v. Lee*, 54 N. J. Law, 580.

So, in construing a conveyance which seeks to create in favor of the grantor certain rights in a part of the land granted, the words will be regarded as an exception or reservation, according as an easement in such part is sought to be created, or the ownership of such part is retained. *Elliot v. Small*, 35 Minn. 396, 59 Am. Rep. 329; *Kister v. Reeser*, 98 Pa. St. 1, 42 Am. Rep. 608; *Jones v. De Lassus*, 84 Mo. 541.

<sup>143</sup> *White v. New York & N. E. R. Co.*, 156 Mass. 181; *Clafin v. Boston & A. R. Co.*, 157 Mass. 489; *Simpson v. Boston & M. R. R.*, 176 Mass. 359; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307, 3 Gray's Cas. 562; *Ring v. Walker*, 87 Me. 550. This views seems to have had weight in inducing the courts to construe such stipulations as exceptions, rather than as reservations.

<sup>144</sup> *Kennedy v. Scovil*, 12 Conn. 326; *Chappell v. New York & N. H. R. Co.*, 62 Conn. 195; *Lathrop v. Elsner*, 93 Mich. 599.

<sup>145</sup> 4 Kent's Comm. 462; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Laberee v. Carleton*, 53 Me. 211; *Gale v. Gould*, 40 Mich. 515; *Beal v. Warren*, 2 Gray (Mass.) 447; *Campbell v. Whit-* (876)

In other words, the owner of land has the same right to make a gift thereof to another person as he has to sell it, and the only persons who can question the validity of the conveyance for want of consideration are creditors who may thereby lose the means of satisfying their demands.<sup>146</sup> The absence of consideration may also deprive the grantee of the right to claim the position of a purchaser for value as against the adverse rights of third persons subsequently accruing.<sup>147</sup>

Ordinarily in a conveyance, a consideration, frequently a nominal sum merely, is named, and the receipt thereof is expressly acknowledged. The purpose of inserting this clause in the conveyance is to rebut any implication of a resulting use or trust in favor of the grantor,<sup>148</sup> and likewise to furnish support for the conveyance as a bargain and sale.<sup>149</sup> Such an acknowledgment of the receipt of the consideration is conclusive upon the parties as to the fact that a consideration was paid, for the purpose of supporting the conveyance, and vesting a beneficial interest in the grantee.<sup>150</sup> It is not, however, conclusive upon the parties or upon third persons as regards the amount of the consideration.<sup>151</sup> And the ab-

son, 68 Ill. 240, 18 Am. Rep. 553; *Lancaster v. Dolan*, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; *Brown v. Brown*, 44 S. C. 378; *Goodwin v. White*, 59 Md. 503.

<sup>146</sup> See post, § 495.

<sup>147</sup> See post, § 483.

<sup>148</sup> See *Meeker v. Meeker*, 16 Conn. 383; *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162; *Acker v. Priest*, 92 Iowa, 610; *Groff v. Rohrer*, 35 Md. 327; *Gould v. Lynde*, 114 Mass. 366; *Moore v. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641; 2 Story, Eq. Jur. § 1199.

<sup>149</sup> See ante, § 376.

<sup>150</sup> *Russ v. Mebius*, 16 Cal. 350; *Kimball v. Walker*, 30 Ill. 482, 511; *Goodspeed v. Fuller*, 46 Me. 141; *Finlayson v. Finlayson*, 17 Or. 347, 11 Am. St. Rep. 836; *Acker v. Priest*, 92 Iowa, 610; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Beavers v. McKinley*, 50 Kan. 602; 2 Pomeroy, Eq. Jur. § 1036.

<sup>151</sup> *Goodspeed v. Fuller*, 46 Me. 141; *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212; *Michael v. Foil*, 100 N. C. 178, 6 Am. St. Rep.

sence of such a recital does not affect the right of the grantee to show its payment for the purpose of supporting the conveyance.<sup>152</sup>

§ 385. Reality of consent.

While a conveyance is presumed to have been made with the free consent of the parties thereto, it may, in certain cases, be shown that such consent was wanting. The want of consent may arise from mistake on the part of the parties as to a material fact concerning the subject-matter of the contract, as when the quantity of land embraced in the description is materially different from that which the parties supposed it to include, and with reference to which the price was fixed.<sup>153</sup> And the fact that the parties failed to agree as to the land to be conveyed, though supposing that they did so, is also ground for rescission of the conveyance.<sup>154</sup> A mistake in the preparation of the conveyance, as when it purports to convey land other than that which it was agreed should be conveyed, or when the land as described differs from that sold, is ground for reformation of the conveyance.<sup>155</sup> So, a mistake in the

577; *Kimball v. Walker*, 30 Ill. 482, 511; *Bolles v. Sachs*, 37 Minn. 318; *Hebbard v. Haughian*, 70 N. Y. 54; *Kickland v. Menasha Wooden Ware Co.*, 68 Wis. 34, 60 Am. Rep. 831; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Wilkinson v. Scott*, 17 Mass. 249.

<sup>152</sup> *Lowry v. Howard*, 35 Ind. 170, 9 Am. Rep. 676; *Boynton v. Rees*, 8 Pick. (Mass.) 329, 19 Am. Dec. 326; *Jackson v. Dillon's Lessee*, 2 Overt. (Tenn.) 261; *Den d. Springs v. Hanks*, 27 N. C. 30; *Sprague v. Woods*, 4 Watts & S. (Pa.) 192; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Underwood v. Campbell*, 14 N. H. 393.

<sup>153</sup> *O'Connell v. Duke*, 29 Tex. 299, 94 Am. Dec. 282; *Hansford v. Chesapeake Coal Co.*, 22 W. Va. 70; *Miller v. Craig*, 83 Ky. 623, 4 Am. St. Rep. 179; *Folsom v. Howell*, 94 Ga. 112; *Read's Adm'rs v. Cramer*, 2 N. J. Eq. 277, 34 Am. Dec. 204.

<sup>154</sup> *Barfield v. Price*, 40 Cal. 535; *Hodges v. Horsfall*, 1 Russ. & M. 116; *Harris v. Pepperell*, L. R. 5 Eq. 1.

<sup>155</sup> *Blair v. McDonnell*, 5 N. J. Eq. 327; *Baxter v. Tanner*, 35 W.

words in the conveyance limiting the interest in the land which it was agreed should be conveyed may be corrected, as when there is an omission of words of inheritance.<sup>156</sup> Relief will also frequently be given when the legal nature and effect of the conveyance as written does not correspond with the agreement of the parties, in accordance with which it is made.<sup>157</sup>

The want of consent may also arise from the fact that the conveyance was procured by fraudulent representations,<sup>158</sup> or by duress,<sup>159</sup> or undue influence.<sup>160</sup>

Va. 60; *Barth v. Deuel*, 11 Colo. 494; *Felton v. Leigh*, 48 Ark. 498; *Baker v. Pyatt*, 108 Ind. 61; *Parker v. Benjamin*, 53 Ill. 255; *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216.

<sup>156</sup> *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *McMillan v. Fish*, 29 N. J. Eq. 610; *Brock v. O'Dell*, 44 S. C. 22; *Lardner v. Williams*, 98 Wis. 514. See *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 816.

<sup>157</sup> *Paget v. Marshall*, 28 Ch. Div. 255; *Gruing v. Richards*, 23 Iowa, 288; *Kerr v. Couper*, 5 Del. Ch. 507; *Sparks v. Pittman*, 51 Miss. 511; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *In re Garnett*, 31 Ch. Div. 648, 33 Ch. Div. 300; *Thoroughgood's Case*, 2 Coke, 9a; *Pollock, Contracts* (6th Ed.) 443; *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 816; *Canedy v. Marcy*, 13 Gray (Mass.) 373.

<sup>158</sup> *Blackburn v. Wooding*, 6 C. C. A. 6, 56 Fed. 545; *Castle v. Kemp*, 124 Ill. 307; *Carver v. Carver*, 97 Ind. 497; *Berry v. Whitney*, 40 Mich. 65; *Mortland v. Mortland*, 151 Pa. St. 593; *Matlack v. Shaffer*, 51 Kan. 208, 37 Am. St. Rep. 270; *Ruffner v. Ridley*, 81 Ky. 165.

<sup>159</sup> *Harshaw v. Dobson*, 67 N. C. 203; *Eadie v. Slimmon*, 26 N. Y. 12; *Gohegan v. Leach*, 24 Iowa, 509; *Tapley v. Tapley*, 10 Minn. 448 (Gil. 360), 88 Am. Dec. 76; *Muller v. Buyck*, 12 Mont. 354; *Kocourek v. Marak*, 54 Tex. 201, 38 Am. Rep. 623. See *Rendleman v. Rendleman*, 156 Ill. 568.

<sup>160</sup> *Ross v. Conway*, 92 Cal. 632; *Chase v. Hubbard*, 153 Mass. 91; *Caspari v. First German Church of New Jerusalem*, 82 Mo. 649; *Graham v. Burch*, 44 Minn. 33; *Hoppin v. Tobey's Ex'rs*, 9 R. I. 42; *Leighton v. Orr*, 44 Iowa, 679; *Sands v. Sands*, 112 Ill. 225; *Allore v. Jewell*, 94 U. S. 506.

## § 386. Effect of alterations.

Since the conveyance takes effect only upon delivery,<sup>161</sup> until that is effected, the grantor may make such alterations or insertions therein as he may desire.<sup>162</sup>

An alteration made, after delivery, by consent of all the parties to the conveyance, is binding and effective if it is followed by a new delivery of the instrument,<sup>163</sup> provided, it seems, that no rights vested in the grantee by the conveyance as it originally stood are divested by such alteration,<sup>164</sup> and subject to the restriction that the record of the conveyance in its altered state will not affect innocent third persons unless it is acknowledged after the alteration.<sup>165</sup>

An alteration made after the delivery of the conveyance, not followed by a new delivery, is absolutely nugatory, so far as concerns any rights which may have already vested under the conveyance.<sup>166</sup> Any material alteration, erasure,

<sup>161</sup> Post, § 406.

<sup>162</sup> *Duncan v. Hodges*, 4 McCord (S. C.) 239, 17 Am. Dec. 734; *Miller v. Williams* (Colo.) 59 Pac. 740; *Reformed Dutch Church of North Branch v. Ten Eyck*, 25 N. J. Law, 40; *Coney v. Laird*, 153 Mo. 408.

<sup>163</sup> *Malarin v. United States*, 1 Wall. (U. S.) 282; *Woodbury v. Allegheny & K. R. Co.* (C. C.) 72 Fed. 371; *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64, 75 Am. Dec. 681; *Bassett v. Bassett*, 55 Me. 127; *Prettyman v. Goodrich*, 23 Ill. 330; *Burns v. Lynde*, 6 Allen (Mass.) 305; *Tucker v. Allen*, 16 Kan. 312; *Byers v. McClanahan*, 6 Gill & J. (Md.) 250.

<sup>164</sup> See post, § 406.

<sup>165</sup> *Moelle v. Sherwood*, 148 U. S. 21; *Sharpe v. Orme*, 61 Ala. 263; *Webb v. Mullins*, 78 Ala. 111. See *Coit v. Starkweather*, 8 Conn. 289.

<sup>166</sup> *Doe d. Lewis v. Bingham*, 4 Barn. & Ald. 672; *Chessman v. Whittemore*, 23 Pick. (Mass.) 231; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Jackson v. Jacoby*, 9 Cow. (N. Y.) 125; *Stanley v. Epperson*, 45 Tex. 645; *North v. Henneberry*, 44 Wis. 306; *Rifener v. Bowman*, 53 Pa. St. 313; *Collins v. Collins*, 51 Miss. 311, 24 Am. Rep. 632.



or cancellation, however, invalidates any limitations or covenants therein having an operation in the future.<sup>167</sup>

### III. DESCRIPTION OF THE LAND.

The most usual modes of describing the land which is the subject of the conveyance are (1) the use of a distinctive designation recognized as applicable to that particular land; (2) reference to the township and section of the government survey; (3) reference to a map or plat which indicates the location of the land; (4) identification of the boundaries of the land by reference to monuments or courses and distances.

A conveyance of land as bounded on a body of water or watercourse, or on a highway, will pass the land under the water or within the highway as far as the grantor owns, this being usually as far as the center of a watercourse or a highway. A different rule is frequently adopted when the land is in terms bounded by the margin of the water or the highway.

Easements appurtenant to land pass therewith without special mention.

#### § 387. General considerations.

In order to make a valid conveyance of land, it is essential that the land itself, the subject of the conveyance, be capable of identification, and, if the conveyance does not refer to the land with such particularity as to render this possible, the conveyance is absolutely nugatory.<sup>168</sup> The lan-

<sup>167</sup> Sheppard's Touchstone (Preston's Ed.) 69; Mathewson's Case, 5 Coke, 23a; 2 Bl. Comm. 308; 4 Cruise, Dig. tit. 32, c. 27, §§ 12-22; Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; North v. Henneberry, 44 Wis. 306; Withers v. Atkinson, 1 Watts (Pa.) 236; Wallace v. Harmstad, 15 Pa. St. 462, 53 Am. Dec. 603; Chessman v. Whittemore, 23 Pick. (Mass.) 231.

<sup>168</sup> Brandon v. Leddy, 67 Cal. 43; Holme v. Strautman, 35 Mo. 293; Carter v. Barnes, 26 Ill. 455; Wilson v. Johnson, 145 Ind. 40; Wilson v. Inloes, 6 Gill (Md.) 121; Bailey v. White, 41 N. H. 337; Kea v. Robeson, 40 N. C. 373; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769.

guage of the conveyance by which the land is sought to be identified is usually referred to as the "description."

The description may be by the use of a designation for the land which has a recognized application thereto, as when one conveys the "A." estate or the "B." farm.<sup>169</sup> The grantor may also describe the land as his land in a certain town, or in a certain block, or on a certain street, and such a description is sufficient if the land can be identified.<sup>170</sup> So, a conveyance of "all the land" or "all the property" owned by the grantor, or of all that owned by him in a particular district, is sufficient to convey land within the scope of the description,<sup>171</sup> as is a conveyance of all one's interest in the estate of a person deceased,<sup>172</sup> or of such land as formerly belonged to or was conveyed to a particular person.<sup>173</sup>

Whenever land is occupied and improved by a building or other structure designed for a particular purpose, which comprehends its beneficial use and enjoyment, it may be conveyed by a term which thus describes the purpose to which

<sup>169</sup> See *Haley v. Amestoy*, 44 Cal. 132; *Trentman v. Neff*, 124 Ind. 503; *Vaughan v. Swayzie*, 56 Miss. 706; *Charles v. Patch*, 87 Mo. 450; *Lennig's Ex'rs v. White* (Va.) 20 S. E. 831.

<sup>170</sup> *Frey v. Clifford*, 44 Cal. 335; *Blair v. Bruns*, 8 Colo. 397; *Bird v. Bird*, 40 Me. 398; *Harmon v. James*, 7 Smedes & M. (Miss.) 111, 45 Am. Dec. 296; *Doe d. Carson v. Ray*, 52 N. C. 609, 78 Am. Dec. 267.

<sup>171</sup> *Pettigrew v. Dobbelaar*, 63 Cal. 396; *First Nat. Bank of Attleboro v. Hughes*, 10 Mo. App. 7; *Brown v. Warren*, 16 Nev. 228; *Marr v. Hobson*, 22 Me. 321; *Harvey v. Edens*, 69 Tex. 420; *Clifton Heights Land Co. v. Randell*, 82 Iowa, 89; *Sally v. Gunter*, 13 Rich. Law (S. C.) 72.

<sup>172</sup> *Sheppard's Touchstone*, 250; *Barnes v. Bartlett*, 47 Ind. 98; *Patterson v. Snell*, 67 Me. 559; *Butrick v. Tilton*, 141 Mass. 93; *Austin v. Dolbee*, 101 Mich. 292; *Stewart v. Cage*, 59 Miss. 558; *Barton's Lessee v. Morris' Heirs*, 15 Ohio, 408; *McGavock v. Deery*, 1 Cold. (Tenn.) 265.

<sup>173</sup> *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Hogan v. Page*, 22 Mo. 55; *McChesney's Lessee v. Wainwright*, 5 Ohio, 452; *Gresham v. Chambers*, 80 Tex. 544.

it is thus appropriated.<sup>174</sup> Thus, under the designation of a "house," a "mill," a "factory," or like expressions, not only the land beneath the building,<sup>175</sup> but also so much of the adjoining land as is ordinarily used therewith for the purpose expressed in such designation,<sup>176</sup> will pass, provided, of course, a contrary intention does not appear. So, by a conveyance of a "well," not merely the right to take water from the well, but the land itself occupied by the well, will pass.<sup>177</sup>

By a conveyance of "water," the land under the water does not usually pass, the proper description being land covered by water.<sup>178</sup> A conveyance of "woods" or "forests" is sufficient to pass the land itself.<sup>179</sup> A conveyance of the "prof-

<sup>174</sup> *Johnson v. Rayner*, 6 Gray (Mass.) 107; *Cunningham v. Webb*, 69 Me. 92.

<sup>175</sup> *Comyn's Dig. Grant*, E 11; *Dikeman v. Taylor*, 24 Conn. 219; *Hatch v. Brier*, 71 Me. 542; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen (Mass.) 159; *Webster v. Potter*, 105 Mass. 414; *Cravens v. Pettit*, 16 Mo. 210; *Langworthy v. Coleman*, 18 Nev. 440; *Doe d. Wise v. Wheeler*, 28 N. C. 196; *Wilson v. Hunter*, 14 Wis. 683, 80 Am. Dec. 795; *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401, 2 Metc. (Mass.) 591.

<sup>176</sup> *Whitney v. Olney*, 3 Mason, 280, Fed. Cas. No. 17,595; *Sparks v. Hess*, 15 Cal. 186; *Forbush v. Lombard*, 13 Metc. (Mass.) 109; *Ammidown v. Ball*, 8 Allen (Mass.) 293; *Snow v. Inhabitants of Orleans*, 126 Mass. 453; *Gibson v. Brockway*, 8 N. H. 465, 31 Am. Dec. 200; *Winchester v. Hees*, 35 N. H. 43; *Marston v. Stickney*, 58 N. H. 609; *Maddox v. Goddard*, 15 Me. 218, 33 Am. Dec. 604; *Doane v. Broad Street Ass'n*, 6 Mass. 332; *Smith v. Martin*, 2 Saund. 400, note 2. Compare *Ogden v. Jennings*, 62 N. Y. 526.

So a conveyance of a "pound" has been held to include the land under the pound (*Wooley v. Inhabitants of Groton*, 2 Cush. [Mass.] 305), of a "rope walk," land actually and exclusively devoted to the use of the rope walk (*Davis v. Handy*, 37 N. H. 65), and of a "bridge," land on which the bridge is erected (*Sparks v. Hess*, 15 Cal. 186). And a conveyance of a "railroad" may include land used with a railroad. *Missouri Pac. Ry. Co. v. Maffitt*, 94 Mo. 56.

<sup>177</sup> *Johnson v. Rayner*, 6 Gray (Mass.) 107; *Mixer v. Reed*, 25 Vt. 254. See *Co. Litt.* 5.

<sup>178</sup> *Co. Litt.* 4b.

<sup>179</sup> *Co. Litt.* 4b.

its" of land will pass the land itself, "for what is the land but the profits" thereof.<sup>180</sup>

§ 388. Description by government survey.

One of the first acts passed by congress looking towards the disposal of the public domain provided for what is known as the "rectangular system" of surveys, which has ever since been in force, and which furnishes the method of description of land for all purposes of transfer in these parts of the country in which the title to land is derived from the United States.<sup>181</sup> By this system, the public lands are divided into "townships," each six miles square, these being formed by lines running east and west, six miles apart, which are crossed, at intervals of six miles, by lines running north and south. Each township, thus including approximately thirty-six square miles, is divided into thirty-six rectangular portions, each one mile square, called a "section." A section is the smallest subdivision of which the lines are actually run on the ground, but smaller subdivisions are recognized, these being the "quarter section," containing one hundred and sixty acres, formed by running lines at right angles from points on the section boundaries half way between the corners, and "quarter quarter sections," of forty acres each. The areas of the various divisions do not, however, always correspond exactly to the figures above given, owing to irregularities in the land, and the convergence of the meridians as one goes further north.

When the land which would otherwise be comprised within a section is in part covered by navigable waters, "meander" lines are run to define the sinuosities of the bank of the

<sup>180</sup> Co. Litt. 4b; Doe d. Goldin v. Lakeman, 2 Barn. & Adol. 42; Caldwell v. Fulton, 31 Pa. St. 484; Clement v. Youngman, 40 Pa. St. 344.

<sup>181</sup> See Rev. St. U. S. §§ 2395-2397.



stream or lake, and as a means of ascertaining the quantity of land in the "fractional" section, as it is called. These meander lines are not, however, boundaries of such fractional section,<sup>182</sup> these being the banks of the stream or lake, or the middle line thereof, in accordance with considerations previously referred to.<sup>183</sup>

Each tier of townships running north and south is known as a "range," and the range is described with reference to a line known as the "principal meridian," while each tier of townships running east and west is described with reference to some parallel of latitude, taken as a "principal base line." Thus, a township is referred to as being a certain number north or south of a certain base line, and a certain number east or west of a certain meridian.

The thirty-six sections in a township are numbered consecutively, beginning at the northeast corner, and counting west therefrom, and then proceeding east on the tier of sections next below, and so on until section thirty-six is reached in the southeast corner. The quarter section or quarter quarter section is defined with reference to the section of which it forms a part, as when one conveys the southeast quarter of the northwest quarter of section ten, in township thirty-five north, range five east.<sup>184</sup>

### § 389. Reference to plat.

In many of the states there are statutory provisions authorizing an owner of land to have it surveyed and laid off in lots and blocks, streets, parks, and the like, and to file in the public records a plat or map of the land as thus laid off, authenticated and certified as may be required. Thereafter

<sup>182</sup> *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. (U. S.) 272.

<sup>183</sup> See ante, §§ 264-267.

<sup>184</sup> The government method of survey is briefly and clearly described in Warvelle, *Abstracts of Title*, 138 et seq.



any one of these lots or blocks may be conveyed by mere reference to the number which it bears upon the recorded plat, thus all necessity of a detailed description being obviated. The statute usually contains provisions to the effect that the filing of the plat shall constitute a dedication of the land marked thereon as intended for streets or other public uses.

Even though there is no statutory provision on the subject, or the plat is not authenticated and recorded as required by the statute, a reference in the conveyance to a particular plat for purposes of description makes the plat in effect a part of the conveyance, and it may accordingly be utilized to identify the land conveyed.<sup>185</sup> The only effect, therefore, of the statutes providing for the record of plats, so far as concerns their use for purposes of description, is apparently to furnish a means for their preservation, and thus to avoid any possible loss of the means of identifying the land.

### § 390. Monuments, courses, and distances.

Land is frequently described in a conveyance, or attempted to be described, by naming its boundaries in detail. Such a description, if properly made, is well calculated to identify the land, but frequently, owing to carelessness in making the survey on which the description is based, or in preparing the conveyance, there is difficulty in locating the boundaries on the ground. In the case of a description by boundaries, as in other cases, the intention of the parties, as inferred from the terms of the description, is the controlling consideration,<sup>186</sup> and any rules which the courts may have formulated

<sup>185</sup> *Simmons v. Johnson*, 14 Wis. 523; *Young v. Cosgrove*, 83 Iowa, 682; *Corbett v. Norcross*, 35 N. H. 99; *Deery v. Cray*, 10 Wall. (U. S.) 263; *Sanders v. Ransom*, 37 Fla. 457; *Sears v. King*, 91 Ga. 577; *Borough of Birmingham v. Anderson*, 48 Pa. St. 253; *Erschine v. Moulton*, 66 Me. 276; *Nichols v. New England Furniture Co.*, 100 Mich. 230; *Sanborn v. Mueller*, 38 Minn. 27.

<sup>186</sup> *Reed v. Proprietors of Locks & Canals on Merrimac River*, 8 (886)

as to the relative importance of various elements of the description are merely intended as aids in arriving at this intention. Boundaries are described by naming natural or artificial monuments to, from, or along which the lines are to run, or by stating the "courses and distances" of such lines, and frequently by all these "elements" of description, as they are termed.

A monument, for the purpose of description, may consist of any object or mark on the land, whether natural or artificial, which may serve to identify the location of a line constituting a part of the boundary. The monument may be either a permanent natural object, such as a river, lake, ledge of rocks, or tree, or it may be an artificial object, such as a highway, wall, ditch, or a post.

Frequently the corners or lines are defined by reference to adjoining land, or to some adjoining structure which, in its legal signification, includes the land under it, such as a house or a mill. In such a case the land conveyed extends merely to the side of the land or structure referred to as a monument,<sup>187</sup> while in the ordinary case of a monument, the name of which does not include the ownership of land, such as a highway, wall, or post, the land conveyed extends to the center thereof.<sup>188</sup> A monument may even consist of an object or point not existent or fixed at the time of the conveyance, but which is intended to be thereafter erected or fixed, and, when this is done, the call therefor will be of the same

How. (U. S.) 274; *Abbott v. Abbott*, 51 Me. 575; *Codman v. Evans*, 1 Allen (Mass.) 443; *Serrano v. Rawson*, 47 Cal. 52; *Bruensmann v. Carroll*, 52 Mo. 313; *Peck v. Mallams*, 10 N. Y. 509; *White v. Gay*, 9 N. H. 126, 31 Am. Dec. 224; *Miller v. Bryan*, 86 N. C. 167; *Browning's Adm'x v. Atkinson*, 37 Tex. 633.

<sup>187</sup> *City of Boston v. Richardson*, 13 Allen (Mass.) 146, 154.

<sup>188</sup> *City of Boston v. Richardson*, 13 Allen (Mass.) 146, 154; *Freeman v. Bellegarde*, 108 Cal. 179; *Sleeper v. Laconia*, 60 N. H. 201.

effect as if the monument had existed at the time of the conveyance.<sup>189</sup>

A "course" is the direction in which a line runs, stated with reference, not to its terminus, but to its correspondence with a certain point of the compass, or its variation from the magnetic or sidereal meridian.

Subject to the controlling consideration of the intention of the parties, the primary rule in applying a description by boundaries is that, in case of conflict, calls for fixed and known monuments will prevail over inconsistent calls for courses and distances, monuments marked on the ground being from their very nature more likely to be correct than mere paper statements as to the character of an imaginary line.<sup>190</sup> This rule is, however, not absolute, and the calls for monuments must yield to those for courses and distances if it in any way appears that the calls for courses and distances are more to be relied on.<sup>191</sup> When the courses and distances conflict, the whole description is to be considered to determine which conforms to the intention of the parties, and there is no rule by which preference is to be given to one element as against the other.<sup>192</sup>

<sup>189</sup> *Makepeace v. Bancroft*, 12 Mass. 469, 3 Gray's Cas. 287; *Lerned v. Morrill*, 2 N. H. 197, 3 Gray's Cas. 289; *Blaney v. Rice*, 20 Pick. (Mass.) 62, 3 Gray's Cas. 293; *Mosher v. Berry*, 30 Me. 83, 50 Am. Dec. 614. See *Maxey v. Thurman*, 50 Cal. 321.

<sup>190</sup> *Pernam v. Wead*, 6 Mass. 131, 3 Gray's Cas. 285; *Newsom v. Prior's Lessee*, 7 Wheat. (U. S.) 10; *White v. Williams*, 48 N. Y. 344, 3 Gray's Cas. 300; *Hoban v. Cable*, 102 Mich. 206, *Finch's Cas.* 1081; *Beaudry v. Doyle*, 68 Cal. 105; *Allen v. Kersey*, 104 Ind. 1; *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Bauer v. Gottmanhausen*, 65 Ill. 499; *Cox v. Couch*, 8 Pa. St. 147; *Johnson v. Archibald*, 78 Tex. 96, 22 Am. St. Rep. 27; 4 Kent's Comm. 466.

<sup>191</sup> *White v. Luning*, 93 U. S. 514; *United States v. Cameron* (Ariz.) 21 Pac. 177; *Hamilton v. Foster*, 45 Me. 32; *Murdock v. Chapman*, 9 Gray (Mass.) 156; *Buffalo, N. Y. & E. R. Co. v. Stigeler*, 61 N. Y. 348; *Jamison v. Fopiano*, 48 Mo. 194.

<sup>192</sup> *Hall v. Eaton*, 139 Mass. 217, 3 Gray's Cas. 305; *Preston's* (888)

Quite frequently the quantity or estimated quantity of the land is named in the conveyance, but this is considered inferior as an indication of the location of the boundaries to the elements above named, and, if inconsistent, must yield to calls for courses and distances,<sup>193</sup> as well as to calls for monuments.<sup>194</sup> In particular cases, however, when the other calls evidently do not conform to the intention of the parties, a call for quantity may have a controlling effect.<sup>195</sup>

When the description of a boundary line is uncertain and ambiguous, if the parties to the conveyance locate and mark on the ground a certain line as being that described, and hold possession accordingly, this "practical location" of the line is regarded as showing the meaning of the ambiguous description, and, as such, conclusive on each of them.<sup>196</sup> Occasionally it has even been decided that a line thus marked out and acted on is conclusive upon the parties, though the course as given in the conveyance is free from ambiguity, and calls for a different line.<sup>197</sup>

*Heirs v. Bowmar*, 6 Wheat. (U. S.) 580; *McClintock v. Rogers*, 11 Ill. 279; *Blight v. Atwell*, 4 J. J. Marsh. (Ky.) 278; *Williams v. Mayfield*, 57 Tex. 364; *Curtis v. Aaronson*, 49 N. J. Law, 68; *Loring v. Norton*, 8 Me. 61.

<sup>193</sup> *Doe d. Phillips' Heirs v. Porter*, 3 Ark. 18, 36 Am. Dec. 448; *Gilman v. Smith*, 12 Vt. 150; *Allen v. Kersey*, 104 Ind. 1; *Sanders v. Godding*, 45 Iowa, 463; *Ray v. Pease*, 95 Ga. 153.

<sup>194</sup> *Emery v. Fowler*, 38 Me. 99, 3 Gray's Cas. 295; *Allen v. Kersey*, 104 Ind. 1; *Doe d. Arden v. Thompson*, 5 Cow. (N. Y.) 371; *Thompson v. Sheppard*, 85 Ala. 611; *Petts v. Gaw*, 15 Pa. St. 218.

<sup>195</sup> *Winans v. Cheney*, 55 Cal. 567; *Hoffman v. City of Port Huron*, 102 Mich. 417; *Sanders v. Godding*, 45 Iowa, 463.

<sup>196</sup> *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235; *Hastings v. Stark*, 36 Cal. 122; *Raymond v. Nash*, 57 Conn. 447; *Den d. Haring v. Van Houten*, 22 N. J. Law, 61; *Stone v. Clark*, 1 Metc. (Mass.) 381; *Meeks v. Willard*, 57 N. J. Law, 22; *Linney v. Wood*, 66 Tex. 22; *Messer v. Oestreich*, 52 Wis. 684.

<sup>197</sup> *Knowles v. Toothaker*, 58 Me. 172, 3 Gray's Cas. 297; *Kellogg v. Smith*, 7 Cush. (Mass.) 375. This seems to be an approximation to the view held by some of the courts that any adjoining owners

## § 391. Boundaries on water.

The question whether land under water belongs, in certain cases, to the state or to individuals, has been before discussed.<sup>198</sup> The question now arises as to when, in case of land under water not belonging to the state, a conveyance of land as abutting on the water will be construed as including land under the water belonging to the grantor. The general rule of construction of a conveyance of land bounded by water is that, unless a contrary intention appears, it passes the soil towards the center of the water as far as the grantor owns.<sup>199</sup> Accordingly, if the shore of the sea belongs to the owner of the upland, it passes by a conveyance by him of land bounded "by the sea" or "harbor," or other words descriptive of the water.<sup>200</sup> So, a grant of land bounded on a navigable nontidal river, in those states in which the land under such a river is not vested in the state, *prima facie* conveys the whole interest of the grantor so far as he owns, which is usually to the center of the stream.<sup>201</sup> So the grant of land bounded on a nontidal, nonnavigable river, the land under which is usually in the abutting owner *ad filum aquae*,—that is, to the middle or thread of the stream,—*prima facie* con-

may locate the intervening boundary line by mere oral agreement. See ante, §§ 259, 260.

<sup>198</sup> Ante, §§ 264-267.

<sup>199</sup> *Paine v. Woods*, 108 Mass. 160, 3 Gray's Cas. 329. See note to *Allen v. Weber*, 27 Am. St. Rep. 56.

<sup>200</sup> *City of Boston v. Richardson*, 105 Mass. 351; *Winslow v. Pat-ten*, 34 Me. 25; *Partridge v. Luce*, 36 Me. 16; *Harlow v. Fisk*, 12 Cush. (Mass.) 302; *Freeman v. Bellegarde*, 108 Cal. 179.

<sup>201</sup> *Jones v. Janney*, 8 Watts & S. (Pa.) 436, 42 Am. Dec. 309; *Braxon v. Bressler*, 64 Ill. 492; *Norcross v. Griffiths*, 65 Wis. 615, 56 Am. Rep. 642; *Butler v. Grand Rapids & I. R. Co.*, 85 Mich. 246, 24 Am. St. Rep. 84; *June v. Purcell*, 36 Ohio St. 396; *City of Boston v. Richardson*, 105 Mass. 351; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372; *Inhabitants of Warren v. Inhabitants of Thomaston*, 75 Me. 329, 46 Am. Rep. 397.



veys the soil to such middle line.<sup>202</sup> In the case of a conveyance of land bounded by a lake or pond, the same general rule, by the weight of authority, applies, and the conveyance *prima facie* passes the soil so far as the grantor owns, whether this ownership extends to the center of the lake, to the high-water mark, or to an intermediate point.<sup>203</sup>

The effect thus given to conveyances as passing, *prima facie*, the soil under the water, is based not only on the presumption that the parties intend the ownership thereof to be vested in the person who is alone, usually, in a position to make use of it, and who probably will need to do so, but also, in some decisions, upon the ground of public policy, which renders it desirable to prevent the existence of small strips of land along the margin of streams or other bodies of water, the title to which may remain in abeyance for many years, and which may then be asserted merely in order to harass the owner of the adjoining land.<sup>204</sup> Sometimes, however, in the case of a stream, the rule is stated as being merely an application of the principle that, when a monument is referred to, the land conveyed extends to the center of such monument.<sup>205</sup>

<sup>202</sup> *Stanford v. Mangin*, 30 Ga. 355; *State v. Gilmanton*, 9 N. H. 461; *Muller v. Landa*, 31 Tex. 265, 98 Am. Dec. 529; *Canal Fund Com'rs v. Kempshall*, 26 Wend. (N. Y.) 404; *Fulmer v. Williams*, 122 Pa. St. 191, 9 Am. St. Rep. 88.

<sup>203</sup> *Paine v. Woods*, 108 Mass. 160, 3 Gray's Cas. 329; *Brophy v. Richeson*, 137 Ind. 114; *Castle v. Elder*, 57 Minn. 289; *Hardin v. Jordan*, 140 U. S. 371; *Stoner v. Rice*, 121 Ind. 51; *Clute v. Fisher*, 65 Mich. 48; *Cobb v. Davenport*, 32 N. J. Law, 369; *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 30 Am. St. Rep. 669; *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828. *Contra*, *Stevens v. King*, 76 Me. 197, 49 Am. Rep. 609; *Kanouse v. Slockbower*, 48 N. J. Eq. 42.

<sup>204</sup> See dissenting opinion by Redfield, J., in *Buek v. Squiers*, 22 Vt. 484; *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637.

<sup>205</sup> *Sleeper v. Laconia*, 60 N. H. 201, 3 Gray's Cas. 333; *Child v. Starr*, 4 Hill (N. Y.) 369.

When the land conveyed is described, not as bounded by a stream, but by or on the "bank," "shore," "margin," or "edge" of the stream, or equivalent terms are used, the land under the water is usually regarded as excluded.<sup>206</sup> In such cases the line of low-water mark has usually been adopted as the boundary.<sup>207</sup> The same principle has been adopted in the case of conveyances of land bounded by the margin or shore of a lake.<sup>208</sup>

The fact that the description, while stating that the land is bounded "by" a stream, or that it extends "to" a stream, or that a boundary runs "along" the stream, names an object on the shore as a monument, does not show an intention to exclude the stream, but this is regarded as merely a statement of the point at which the boundary strikes the stream, it being usually impracticable to place monuments actually in the stream.<sup>209</sup>

<sup>206</sup> *Child v. Starr*, 4 Hill (N. Y.) 369, reversing 20 Wend. (N. Y.) 149, 3 Gray's Cas. 315; *Halsey v. McCormick*, 13 N. Y. 296, 3 Gray's Cas. 327; *Rockwell v. Baldwin*, 53 Ill. 19; *Bradford v. Cressey*, 45 Me. 9; *Murphy v. Copeland*, 51 Iowa, 515, 43 Am. Rep. 118; *Lamb v. Ricketts*, 11 Ohio, 311; *Allen v. Weber*, 80 Wis. 531, 27 Am. St. Rep. 51; *Eddy v. St. Mars*, 53 Vt. 462, 38 Am. Rep. 695. Contra, *Sleeper v. Laconia*, 60 N. H. 201, 3 Gray's Cas. 333, 49 Am. Rep. 311.

<sup>207</sup> *Halsey v. McCormick*, 13 N. Y. 296, 3 Gray's Cas. 327; *Lamb v. Ricketts*, 11 Ohio, 311; *Murphy v. Copeland*, 58 Iowa, 409, 43 Am. Rep. 118.

<sup>208</sup> *Axline v. Shaw*, 35 Fla. 305; *Brophy v. Richeson*, 137 Ind. 114; *Allen v. Weber*, 80 Wis. 531, 27 Am. St. Rep. 51. But see *Castle v. Elder*, 57 Minn. 289.

<sup>209</sup> *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637, 3 Gray's Cas. 324; *Low v. Tibbetts*, 72 Me. 92, 39 Am. Rep. 303; *Berry v. Snyder*, 3 Bush (Ky.) 266, 96 Am. Dec. 219; *Pike v. Munroe*, 36 Me. 309, 58 Am. Dec. 751; *Cold Spring Iron Works v. Inhabitants of Tolland*, 9 Cush. (Mass.) 492; *Grant v. White*, 63 Pa. St. 271; *Rix v. Johnson*, 5 N. H. 520, 22 Am. Dec. 472; *Kent v. Taylor*, 64 N. H. 489; *County of St. Clair v. Lovington*, 23 Wall. (U. S.) 46, 64.

## § 392. Boundaries on ways.

As before stated, the ownership of land which is subject to use as a highway is, at common law, in individuals, the public having merely the use thereof, while in this country, by force of statute, the ownership of the land—the “fee” as it is called—is quite frequently in the state or municipality in trust for the public. In the latter case, a conveyance of land as bounded “by” or “along” the highway can, of course, vest in the grantee no part of the land occupied by the highway, and he takes merely to the outer edge thereof. When, however, the grantor owns part or the whole of the land subject to the highway use, the question frequently arises whether his conveyance passes land within the highway, and, in deciding this question, the same considerations apply as in the analogous case of a conveyance of land bounded by water, the soil under which belongs to the grantor.

A conveyance of land as bounded “on” or “by” or as running “along” a highway will convey to the center line of the highway, if the grantor owns thereto, unless a contrary intention appear from the conveyance.<sup>210</sup> So, when land abutting on a highway is conveyed by terms of description which make no mention of the highway, as when it is conveyed by a number on a plat, the grantor’s interest in the land within the highway limits presumably passes;<sup>211</sup> and this is so, even

<sup>210</sup> *Paul v. Carver*, 26 Pa. St. 223, 3 Gray’s Cas. 356; *White v. Godfrey*, 97 Mass. 472, 3 Gray’s Cas. 372; *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51; *Columbus & W. Ry. Co. v. Witherow*, 82 Ala. 190; *Kittle v. Pfeiffer*, 22 Cal. 484; *Silvey v. McCool*, 86 Ga. 1; *City of Dubuque v. Maloney*, 9 Iowa, 451, 74 Am. Dec. 358; *Thomas v. Hunt*, 134 Mo. 392; *In re Ladue*, 118 N. Y. 213; *Elphinstone*, Interpret. of Deeds, 179. And so a conveyance of land “south of the road” has been held to convey a part of the highway. *Helmer v. Castle*, 109 Ill. 664.

<sup>211</sup> *Berridge v. Ward*, 10 C. B. (N. S.) 400, 3 Gray’s Cas. 334; *Champlin v. Pendleton*, 13 Conn. 23, 3 Gray’s Cas. 342; *Gear v. Barnum*, 37 Conn. 229; *White’s Bank of Buffalo v. Nichols*, 64 N. Y.

though the length of the boundary lines running towards the highway, as given, would carry them only so far as the edge of the highway.<sup>212</sup> On the other hand, a description of the land as bounded by or on the "side," "margin," or "edge" of the highway is usually regarded as showing an intention to exclude the land within the highway limits from the operation of the conveyance,<sup>213</sup> though in some states a different view is taken.<sup>214</sup>

By analogy to the rule applied in the case of boundaries on streams, it would seem that a monument at the side or edge of the highway, when referred to as a starting point for a line running along the highway, should not exclude the soil within the highway limits, but that it might well be regard-

65, 3 Gray's Cas. 373; *Florida Southern Ry. Co. v. Brown*, 23 Fla. 104; *Anthony v. City of Providence*, 18 R. I. 699; *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178; *City of Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Kneeland v. Valkenburgh*, 46 Wis. 434, 32 Am. Rep. 719. Contra, *Sutherland v. Jackson*, 32 Me. 80; *Hanson v. Campbell's Lessee*, 20 Md. 223; *Grant v. Moon*, 128 Mo. 43. Compare *Hoboken Land & Improvement Co. v. Kerrigan*, 31 N. J. Law, 13.

<sup>212</sup> *Oxton v. Groves*, 68 Me. 371, 28 Am. Rep. 75; *Paul v. Carver*, 26 Pa. St. 223, 3 Gray's Cas. 356; *Newhall v. Ireson*, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; *Gould v. Eastern R. Co.*, 142 Mass. 85; *Moody v. Palmer*, 50 Cal. 31. But see, to the contrary, *City of Chicago v. Rumsey*, 87 Ill. 348.

<sup>213</sup> *Buck v. Squiers*, 22 Vt. 484, 3 Gray's Cas. 345; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; *Blackman v. Riley*, 138 N. Y. 318; *Tyler v. Hammond*, 11 Pick. (Mass.) 193; *Holmes v. Turner's Falls Co.*, 142 Mass. 590; *Hughes v. Providence & W. R. Co.*, 2 R. I. 508; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62. So in the case of a reference to "the line" of the highway. *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51; *Cole v. Haynes*, 22 Vt. 588. Contra, *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 32 Am. Rep. 719.

<sup>214</sup> *Paul v. Carver*, 26 Pa. St. 223, 3 Gray's Cas. 356; *Cox v. Freedley*, 33 Pa. St. 124, 3 Gray's Cas. 361; *Woodman v. Spencer*, 54 N. H. 507; *Johnson v. Anderson*, 18 Me. 76 (semble); *Salter v. Jonas*, 39 N. J. Law, 469, 23 Am. Rep. 229; *Anthony v. City of Providence*, 18 R. I. 699. Compare *Hobson v. Philadelphia*, 150 Pa. St. 595.



ed as merely showing the point at which the boundary strikes the highway, since it is not usually practicable to place a monument in the center of the highway. This view has been adopted in at least one state,<sup>215</sup> but usually the naming of a monument at the side or edge of the highway, from which the line is to run along the highway, has been regarded as sufficient to exclude the land within the highway limits.<sup>216</sup> Where the latter view prevails, the same result would necessarily follow when, as the starting point of such line, there is named, not a monument on the side of the highway, but an imaginary point, such as the intersection of the side line with another line.<sup>217</sup>

In applying the foregoing rules, the highway or street referred to is the highway as opened or defined by use, rather than the highway as platted or recorded.<sup>218</sup> A change in the location or limits of the highway after the making of the con-

<sup>215</sup> *Cottle v. Young*, 59 Me. 105; *Low v. Tibbetts*, 72 Me. 92.

<sup>216</sup> *Sibley v. Holden*, 10 Pick. (Mass.) 249, 3 Gray's Cas. 340; *Kings County Fire Ins. Co. v. Stevens*, 87 N. Y. 287, 3 Gray's Cas. 376; *Smith v. Slocomb*, 9 Gray (Mass.) 36; *Peabody Heights Co. of Baltimore v. Sadtler*, 63 Md. 533; *Hunt v. Brown*, 75 Md. 481. And see *Chadwick v. Davis*, 143 Mass. 7; *Peck v. Denniston*, 121 Mass. 17; *Hoboken Land & Improvement Co. v. Kerrigan*, 31 N. J. Law, 13.

<sup>217</sup> *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, 3 Gray's Cas. 373. Contra, *Low v. Tibbetts*, 72 Me. 92.

The words "beginning on the southerly side of" the road, or "at a point" on such side, and like expressions, have been in one state construed as merely indicating the side of the road on which the land lies, and not as locating a corner of the land at the edge of the road. *O'Connell v. Bryant*, 121 Mass. 557, and see *Kneeland v. Van Valkenburgh*, 46 Wis. 434. But more usually a contrary view is taken. *Kings County Fire Ins. Co. v. Stevens*, 87 N. Y. 287, 3 Gray's Cas. 376; *Hoboken Land & Improvement Co. v. Kerrigan*, 31 N. J. Law, 13; *Walker v. Pearson*, 40 Me. 152.

<sup>218</sup> *Falls Village Water Power Co. v. Tibbetts*, 31 Conn. 165; *Cleveland v. Obenchain*, 107 Ind. 591; *Brown v. Heard*, 85 Me. 294; *O'Brien v. King*, 49 N. J. Law, 79; *Blackman v. Riley*, 138 N. Y. 318; *Winter v. Payne*, 33 Fla. 470; *Orena v. City of Santa Barbara*, 91 Cal. 621. But see *Reid v. Klein*, 138 Ind. 484.



veyance in no way affects the boundaries of the abutting land.<sup>219</sup>

In some jurisdictions a conveyance is not regarded as including land which is merely intended to be dedicated as a highway in the future, or which is merely marked on a plat as such, although the land conveyed is described as bounded on such intended highway as if it actually existed.<sup>220</sup> In other jurisdictions it is considered that such a reference to land as a highway raises the same presumption of an intention to convey the land to the center of the proposed highway as if the highway actually existed.<sup>221</sup>

If the owner owns the whole of the bed of the highway, and no land on the other side thereof, his conveyance of land on the highway will, it has been held, convey all the land within the highway limits.<sup>222</sup>

When the land conveyed is described as extending a certain distance from the highway, without other means of determining its location, the line is to be measured, it has been decided, from the center line of the highway.<sup>223</sup>

Whether, when the land is described as bounded on a private way, the same rule applies as in the case of a public way,

<sup>219</sup> *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, 3 Gray's Cas. 373; *Brantly v. Huff*, 62 Ga. 532.

<sup>220</sup> *Leigh v. Jack*, 5 Exch. Div. 264, 3 Gray's Cas. 336; *Bangor House Proprietary v. Brown*, 33 Me. 309, 3 Gray's Cas. 354; *Palmer v. Dougherty*, 33 Me. 502, 54 Am. Dec. 636; *O'Linda v. Lothrop*, 21 Pick. (Mass.) 292; *Robinson v. Myers*, 67 Pa. St. 9; *Spackman v. Steidel*, 88 Pa. St. 453. But as to the Pennsylvania rule, see *Bliem v. Daubenspreck*, 169 Pa. St. 282; *Hancock v. Philadelphia*, 175 Pa. St. 124.

<sup>221</sup> *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61, 3 Gray's Cas. 367; *In re Ladue*, 118 N. Y. 213; *Anthony v. City of Providence*, 18 R. I. 699; *Johnson v. Arnold*, 91 Ga. 659. See *Peck v. Denniston*, 121 Mass. 17.

<sup>222</sup> *In re Robbins*, 34 Minn. 99, 57 Am. Rep. 40, 3 Gray's Cas. 382; *Johnson v. Arnold*, 91 Ga. 659.

<sup>223</sup> *Dodd v. Witt*, 139 Mass. 63, 3 Gray's Cas. 380.

so as to give to the grantee the land to the center line thereof, in the absence of a contrary intention, is a question on which the cases are not in accord.<sup>224</sup>

### § 393. Appurtenances.

The effect of a conveyance of land in certain cases as creating an easement corresponding to a pre-existing *quasi* easement has been previously considered.<sup>225</sup> As to the effect of a conveyance of land, not as creating an easement, but as conveying an easement already existing, it is well settled that such an easement will pass on a conveyance of the land to which it appertains,—that is, the dominant tenement,—even though there is no reference to the specific easement, or any statement that all the “appurtenances” or “privileges” belonging to the land shall pass therewith.<sup>226</sup>

<sup>224</sup> In Massachusetts it is held that the same rule applies to private as to public ways. *Fisher v. Smith*, 9 Gray (Mass.) 441, 3 Gray's Cas. 360; *Gould v. Eastern R. Co.*, 142 Mass. 85. See, also, *Witter v. Harvey*, 1 McCord (S. C.) 67, 10 Am. Dec. 650. But a contrary intention may, of course, appear from the terms of the conveyance. *Codman v. Evans*, 1 Allen (Mass.) 443; *Crocker v. Cotting*, 166 Mass. 183. And see *Cushing v. Hathaway*, 10 R. I. 514. In Maine the same rule does not apply to private ways. *Bangor House Proprietary v. Brown*, 33 Me. 309, 3 Gray's Cas. 354; *Ames v. Hilton*, 70 Me. 36. As to the law in New York, see *Mott v. Mott*, 68 N. Y. 246.

<sup>225</sup> Ante, § 317.

<sup>226</sup> *Sheppard's Touchstone*, 89; Co. Litt. 121b; *Crosby v. Bradbury*, 20 Me. 61; *Shelby v. Chicago & E. R. Co.*, 143 Ill. 385; *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338; *Jackson v. Trullinger*, 9 Or. 393; *National Exchange Bank v. Cunningham*, 46 Ohio St. 575; *Winslow v. King*, 14 Gray (Mass.) 323; *Bowling v. Burton*, 101 N. C. 176; *Cope v. Grant*, 7 Pa. St. 488.

In some cases the use of the word “appurtenances” in connection with the conveyance of a building has been referred to as extending the import of the conveyance, as where there was a conveyance of a house or mill “with appurtenances,” in which cases the inclosure and small outbuildings were held to pass. *Ammidown v. Ball*, 8

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The word "appurtenance" is properly confined to things of an incorporeal character, such as easements or profits *a prendre*, and a conveyance of land "with the appurtenances" will not pass land other than that described, on the theory that it is appurtenant thereto, or, as the rule is usually expressed, "land cannot be appurtenant to land."<sup>227</sup> The word "appurtenances" may, however, it appears, be shown not to have, in the particular case, its legal meaning, but to be used in a different sense, such as "usually enjoyed with," and so to pass land other than that specifically described.<sup>228</sup> So, the word "appurtenances" will not usually extend the scope of the conveyance so as to include things of a chattel character, which are not legally part of the land conveyed,<sup>229</sup> but they may, it has been held, be shown to have been intended to be covered by the term.<sup>230</sup>

Allen (Mass.) 293; *State v. Burke*, 66 Me. 127; *Cunningham v. Webb*, 69 Me. 92. But in these cases the effect would, it seems, under the rule previously stated (see note 387), have been the same if the conveyance had contained no reference to the "appurtenances."

<sup>227</sup> *Co. Litt.* 121b; *Harris v. Elliott*, 10 Pet. (U. S.) 25; *Humphreys v. McKissock*, 140 U. S. 304; *Leonard v. White*, 7 Mass. 8, 5 Am. Dec. 19, 3 Gray's Cas. 282; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Ogden v. Jennings*, 62 N. Y. 526; *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Wilson v. Beckwith*, 117 Mo. 61; *Oliver v. Dickinson*, 100 Mass. 114; *Cole v. Haynes*, 22 Vt. 588.

<sup>228</sup> See *Elphinstone*, Interpret. of Deeds, 188; *Hill v. Grange*, 1 Plowd. 164; *Whitney v. Olney*, 3 Mason, 280, Fed. Cas. No. 17,595; *Hearn v. Allen*, Cro. Car. 57; *Thomas v. Owen*, 20 Q. B. Div. 225; *Hill's Lessee v. West*, 4 Yeates (Pa.) 142; *Ammidown v. Granite Bank*, 8 Allen (Mass.) 285.

<sup>229</sup> *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Frey v. Drahos*, 6 Neb. 1; *Scheidt v. Belz*, 4 Ill. App. 431.

<sup>230</sup> *Redlon v. Barker*, 4 Kan. 445; *Badger Lumber Co. v. Marion Water Supply, Electric Light & Power Co.*, 48 Kan. 182, 30 Am. St. Rep. 301; *Gorham v. Eastchester Electric Co.*, 31 Abb. N. C. 198, 29 N. Y. Supp. 1094.

## IV. COVENANTS FOR TITLE.

The conveyance usually contains one or more covenants by the grantor as to the validity of the title sought to be conveyed, on which, in case of failure of title, the grantee has a right of action for damages. The recognized covenants are (1) for seisin, (2) for right to convey, (3) against incumbrances, (4) for quiet enjoyment, (5) of warranty, and (6) for further assurance.

Covenants for seisin and right to convey, which are substantially equivalent, constitute in some states merely a contract that the grantor has seisin of the land, but more usually they are regarded as a declaration that he has the estate which he undertakes to convey.

The covenant against incumbrances is usually in effect a contract that there is no outstanding lien, interest, or right which may affect the value of the land, although a fee-simple estate passes by the conveyance.

The covenants for quiet enjoyment and of warranty are equivalent, and are contracts that the grantee will not be evicted by title paramount, or by the act of the grantor.

The covenant for further assurance is a contract to execute any instrument necessary to perfect the title.

The benefit of covenants for quiet enjoyment, of warranty, and for further assurance runs with the land. In a number of the states of this country, though not in all, the benefit of the other covenants does not so run.

#### § 394. General considerations.

In most conveyances of land there are one or more covenants by the grantor as to the title to the premises, under which the grantee may, in case of failure of title, obtain indemnity in damages. These covenants are of certain recognized classes, having, as a rule, fixed legal effects, though these may be varied by the construction placed upon the covenant in the particular case.<sup>231</sup>

<sup>231</sup> See Rawle, Covenants for Title, § 57. The following outline (899)



In the earlier stages of the common law no such personal covenants were recognized, but the feoffment was usually attended with a "warranty." This common-law warranty, which, taking its origin in the obligation of the feudal lord to protect the holding of his tenant, continued, even after the statute of *Quia Emptores*, to be a usual incident of a feoffment, was in its nature a "covenant real,"—that is, compensation for its breach was awarded, not in damages, but in kind, by a judgment in favor of the warrantee or his heirs, against the original warrantor or his heirs, for the recovery of other lands equal in value to those of which the warrantee had been deprived. A warranty, operating, as it did, against the heir of the warrantor, was, after the statute *De Donis* and before the decision in *Taltarum's Case*, utilized for the purpose, in particular cases, of barring estates tail, and in the efforts to extend its effectiveness in this direction the law of the subject was immensely extended and complicated.<sup>232</sup> The remedy on a warranty was available only in connection with freehold estates, and consequently, if the warranty was attached to a term of years, or if the grantee of a freehold estate was evicted for a term, the warrantee could not recover.<sup>233</sup> In the later history of the subject, however, there was a relaxation of this rule to the extent that when, in such a case, the warranty failed as a covenant real, it might be construed as a personal covenant on which an action for damages might be brought.<sup>234</sup>

After the introduction of conveyances under the Statute of Uses, warranty, which was in its origin associated with

of the law of covenants for title is based almost entirely upon this most admirable work.

<sup>232</sup> See Rawle, *Covenants*, c. 1, where the nature of warranty at common law is clearly stated. See, also, 1 Smith, *Lead. Cas. Eq.* (8th Ed.) 213, American notes to *Spencer's Case*.

<sup>233</sup> Rawle, *Covenants*, §§ 12, 113; 1 Smith, *Lead. Cas. Eq.* 214.

<sup>234</sup> *Pincombe v. Rudge*, Hob. 3g; *Williams v. Burrell*, 1 C. B. 402.



the transfer by feoffment, was gradually supplanted by personal covenants, the purpose of which was to give a remedy in damages against the covenantor in case of failure of title, and which were available in connection with leasehold, as well as freehold, estates, and warranty was finally abolished by statute in England in the nineteenth century.<sup>235</sup>

In this country, settled after the common-law warranty had lost, to a considerable extent, its importance in England, that method of securing the grantee against loss from failure of title was never, to any extent, utilized, but the law of personal covenants for title has been developed and extended to a greater extent even than in England, where the particularity with which intending purchasers examine the title has rendered them comparatively superfluous.

By statute in some states, certain covenants for title are implied from the use of particular operative words in a conveyance, usually "grant, bargain, and sell," and occasionally a covenant in form one of warranty merely is by statute declared to imply certain other covenants for title.<sup>236</sup>

The covenants of title considered in the following sections are "general" covenants,—that is, they are in terms sufficient to protect the covenantee against the claims of all persons whomsoever. Covenants may be, however, and frequently are, "special" in character,—that is, they are so expressed as to afford protection against the acts of the covenantor only, or of persons claiming under him.<sup>237</sup>

### § 395. Covenant for seisin.

The covenant by the grantor that he is lawfully seised of the premises, called the "covenant of seisin," has different

<sup>235</sup> See Rawle, Covenants, §§ 9-14.

<sup>236</sup> Rawle, Covenants, §§ 285-287; 1 Stimson's Am. St. Law, § 1501.

<sup>237</sup> Rawle, Covenants, §§ 28, 29, 126.

effects in different jurisdictions. "Seisin" originally, as before stated, meant the possession of land by one having or claiming a freehold estate therein, either by himself or by another in his behalf.<sup>238</sup> This meaning of "seisin" has been adopted in two or three states in determining the effect of the covenant, and the covenant is there regarded as a declaration by the grantor that he is in possession, claiming such title as he undertakes to convey, which is accordingly satisfied by his claim of title, and is not broken by the fact that he has not such title, though it is broken if another is in adverse possession of the land.<sup>239</sup> The covenant, thus limited in effect, may nevertheless be of very great advantage to the grantee in states which still recognize the doctrine that a conveyance of land in the adverse possession of another is void;<sup>240</sup> and this construction of the covenant presumably owes its origin to the recognition by the courts of the probability that it was intended to secure the grantee against the possible failure of the conveyance for this cause.<sup>241</sup> In the majority of states, however, as in England, the covenant is construed with reference to the meaning which the words "seisin" and "seised" acquired after the Statute of Uses,<sup>242</sup> and it amounts to a covenant that the grantor has the estate, in quantity and quality, which he purports to convey.<sup>243</sup> Ac-

<sup>238</sup> Ante, § 15.

<sup>239</sup> *Marston v. Hobbs*, 2 Mass. 439, 3 Am. Dec. 61; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Cushman v. Blanchard*, 2 Me. 268, 11 Am. Dec. 76; *Wilson v. Widenham*, 51 Me. 566; *Backus' Adm'rs v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585; *Stambaugh v. Smith*, 23 Ohio St. 584; *Wetzell v. Richcreek*, 53 Ohio St. 62.

<sup>240</sup> See post, § 498.

<sup>241</sup> Rawle, *Covenants*, §§ 47-54.

<sup>242</sup> Ante, § 15.

<sup>243</sup> *Parker v. Brown*, 15 N. H. 186; *Catlin v. Hurlburt*, 3 Vt. 407; *Lockwood v. Sturdevant*, 6 Conn. 385; *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379, 3 Gray's Cas. 598; *Real v. Hollister*, 20 Neb. 112; *Woods v. North*, 6 Humph. (Tenn.) 309, 44 Am. Dec. 312; *Pringle v. Witten's Ex'rs*, 1 Bay (S. C.) 256, 1 Am. Dec. 612.

cordingly, the covenant is, in the latter class of states, broken in case the fee-simple title to the land which the grantor purports to convey, or to a part thereof, is outstanding in a third person,<sup>244</sup> or if he has not such an interest as he purports to convey, as when, while purporting to convey an estate in fee simple, the grantor has only an estate in fee tail,<sup>245</sup> or one in remainder.<sup>246</sup> So it is broken if a tenant in common purports to convey the whole interest in the land.<sup>247</sup> It has also been regarded as broken by the fact that things annexed to the premises are subject to a right of removal in a third person,<sup>248</sup> and also by the fact that rights properly appurtenant to the land, or which purport to be conveyed therewith, such as a right of flowage, are not vested in the grantor so as to pass with the land.<sup>249</sup> The covenant is not broken by the existence of a lien on the land,<sup>250</sup> or of a right of use or profit in a third person.<sup>251</sup>

### § 396. Covenant for right to convey.

The covenant that the grantor has a right to convey the

<sup>244</sup> *Anderson v. Knox*, 20 Ala. 156; *Zent v. Picken*, 54 Iowa, 535; *Abbott v. Rowan*, 33 Ark. 593; *Cockrell v. Proctor*, 65 Mo. 41; *Hunt v. Raplee*, 44 Hun (N. Y.) 149; *Wilson v. Forbes*, 13 N. C. 30; *Allen v. Allen*, 48 Minn. 462.

<sup>245</sup> *Comstock v. Comstock*, 23 Conn. 349.

<sup>246</sup> *Mills v. Catlin*, 22 Vt. 106.

<sup>247</sup> *Downer's Adm'rs v. Smith*, 38 Vt. 464; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376.

<sup>248</sup> *Van Wagner v. Van Nostrand*, 19 Iowa, 427; *Mott v. Palmer*, 1 N. Y. 564, *Finch's Cas.* 286.

<sup>249</sup> *Traster v. Nelson's Adm'r*, 29 Ind. 96; *Walker v. Wilson*, 13 Wis. 522; *Adams v. Conover*, 87 N. Y. 422, 41 Am. Rep. 381.

<sup>250</sup> *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Rawle, Covenants*, § 59.

<sup>251</sup> *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272; *Moore v. Johnston*, 87 Ala. 220; *Douglass v. Thomas*, 103 Ind. 187; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Blondeau v. Sheridan*, 81 Mo. 545.

land is usually equivalent to the covenant for seisin, whichever view of the operation of the latter covenant may be taken in the particular jurisdiction.<sup>252</sup> There may, however, be a right to convey, though there be no seisin or title, as when the conveyance is under a power.<sup>253</sup>

### § 397. Covenant against incumbrances.

An "incumbrance," as the term is used in a covenant that the premises are free and clear of all incumbrances, is defined, in a general way, as "every right to or interest in the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance."<sup>254</sup> A lien<sup>255</sup> is an incumbrance, whether it be a mortgage,<sup>256</sup> a judgment lien,<sup>257</sup> a lien for taxes,<sup>258</sup> or any other of the various classes of liens.<sup>259</sup>

<sup>252</sup> *Peters v. Bowman*, 98 U. S. 56; *Baldwin v. Timmins*, 3 Gray (Mass.) 302; *Allen v. Sayward*, 5 Me. 227; *Willard v. Twitchell*, 1 N. H. 177.

<sup>253</sup> *Rawle, Covenants*, § 66. See *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442; *Slater v. Rawson*, 6 Metc. (Mass.) 439.

<sup>254</sup> *Rawle, Covenants*, § 75; *Prescott v. Trueman*, 4 Mass. 630, 3 Am. Dec. 246; *Carter v. Denman's Ex'rs*, 23 N. J. Law, 260; *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432; *Lafferty v. Milligan*, 165 Pa. St. 534.

<sup>255</sup> See post, Part 6.

<sup>256</sup> *Bean v. Mayo*, 5 Me. 94; *Brooks v. Moody*, 25 Ark. 452; *Wyman v. Ballard*, 12 Mass. 304; *Corbett v. Wrenn*, 25 Or. 305; *Funk v. Voneida*, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617.

<sup>257</sup> *Jenkins v. Hopkins*, 8 Pick. (Mass.) 346; *Holman v. Creagmiles*, 14 Ind. 177; *Hall v. Dean*, 13 Johns. (N. Y.) 105.

<sup>258</sup> *Fuller v. Jillett (C. C.)* 2 Fed. 30; *Crowell v. Packard*, 35 Ark. 348; *Cochran v. Guild*, 106 Mass. 29, 8 Am. Rep. 296; *Eaton v. Chesebrough*, 82 Mich. 214; *Campbell v. McClure*, 45 Neb. 608; *Cadmus v. Fagan*, 47 N. J. Law, 549; *Plowman v. Williams*, 6 Lea (Tenn.) 268; *Almy v. Hunt*, 48 Ill. 45.

<sup>259</sup> So, an attachment lien (*Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638, and *Norton v. Babcock*, 2 Metc. [Mass.] 510); a vendor's lien (*Thomas v. St. Paul's Methodist Episcopal Church*, 86 Ala. 138).

An easement is, generally speaking, an incumbrance, as in the case of a private right of way,<sup>260</sup> or a right to maintain a drain or artificial watercourse,<sup>261</sup> or a right to flow land.<sup>262</sup> An easement, however, which is created by the conveyance of a *quasi* servient tenement,<sup>263</sup> is not regarded as within a covenant against incumbrances in such a conveyance, and the effect of the conveyance in creating an easement in favor of the grantor is not affected by the fact that it contains a covenant against incumbrances.<sup>264</sup> A natural right in an owner of neighboring land, such as a right to the uninterrupted flow of a stream, is not within the covenant,<sup>265</sup> but a right in a third person to interfere with the natural right to the customary flow of a stream is, it seems, an incumbrance.<sup>266</sup>

In a majority of the states a highway is regarded as an incumbrance,<sup>267</sup> though a different view is taken in others.<sup>268</sup> A railroad right of way is also an incumbrance.<sup>269</sup>

<sup>260</sup> Mitchell v. Warner, 5 Conn. 497; Blake v. Everett, 1 Allen (Mass.) 248; Wilson v. Cochran, 46 Pa. St. 229; McGowen v. Myers, 60 Iowa, 256.

<sup>261</sup> Prescott v. White, 21 Pick. (Mass.) 341, 32 Am. Dec. 266; Smith v. Sprague, 40 Vt. 43; McMullin v. Wooley, 2 Lans. (N. Y.) 394.

<sup>262</sup> Scriver v. Smith, 100 N. Y. 471, 53 Am. Rep. 224; Patterson v. Sweet, 3 Ill. App. 550. But see as to the rule in Maine and Massachusetts, as affected by the flowage acts of those states, Rawle, Covenants, § 83.

<sup>263</sup> See ante, § 317.

<sup>264</sup> Harwood v. Benton, 32 Vt. 724; Dunklee v. Wilton R. Co., 24 N. H. 489. See Rawle, Covenants, § 85.

<sup>265</sup> Prescott v. Williams, 5 Metc. (Mass.) 429.

<sup>266</sup> Huyck v. Andrews, 113 N. Y. 81, 10 Am. St. Rep. 432; Morgan v. Smith, 11 Ill. 199. But see Cary v. Daniels, 8 Metc. (Mass.) 466, 41 Am. Dec. 532.

<sup>267</sup> Kellogg v. Ingersoll, 2 Mass. 101; Copeland v. McAdory, 100 Ala. 553; Hubbard v. Norton, 10 Conn. 423; Herrick v. Moore, 19 Me. 313; Butler v. Gale, 27 Vt. 739; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731.

<sup>268</sup> Patterson v. Arthurs, 9 Watts (Pa.) 152; Wilson v. Cochran, 46 Pa. St. 233; Harrison v. Des Moines & Ft. D. Ry. Co., 91 Iowa,



A covenant as to the use of land, or a restriction upon its use, whether enforceable at law or in equity, is a breach of the covenant against incumbrances,<sup>270</sup> as is an obligation upon the owner of the land to maintain a fence.<sup>271</sup> A right to take profits in the shape of timber or minerals from the land is also an incumbrance.<sup>272</sup>

The existence of a right of dower, whether inchoate or consummate, has been usually recognized as a breach of the covenant.<sup>273</sup> A lease for years outstanding in a third person is also an incumbrance,<sup>274</sup> except when the covenantee purchased the land with notice of the lease, in which case it is regarded as a benefit, rather than a detriment, and so not an incumbrance.<sup>275</sup>

114; *Deacons v. Doyle*, 75 Va. 258; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85. Compare *Trice v. Kayton*, 84 Va. 217.

<sup>269</sup> *Quick v. Taylor*, 113 Ind. 540; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Farrington v. Turtelott* (C. C.) 39 Fed. 738. Contra, *Smith v. Hughes*, 50 Wis. 627.

<sup>270</sup> *Locke v. Hale*, 165 Mass. 20; *Foster v. Foster*, 62 N. H. 46; *Docter v. Darling*, 68 Hun (N. Y.) 70; *Greene v. Creighton*, 7 R. I. 1; *Halle v. Newbold*, 69 Md. 265.

<sup>271</sup> *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335, 2 Gray's Cas. 328; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633.

<sup>272</sup> *Spurr v. Andrew*, 6 Allen (Mass.) 420; *Stambaugh v. Smith*, 23 Ohio St. 584; *Cathcart v. Bowman*, 5 Pa. St. 317.

<sup>273</sup> *Porter v. Noyes*, 2 Me. 22, 11 Am. Dec. 30; *Runnels v. Webber*, 59 Me. 488; *Bigelow v. Hubbard*, 97 Mass. 195; *Walker's Adm'r v. Deaver*, 79 Mo. 664; *Barnett v. Gaines*, 8 Ala. 373; *Russ v. Perry*, 49 N. H. 547; *Carter v. Denman's Ex'rs*, 23 N. J. Law, 260.

<sup>274</sup> *Clark v. Fisher*, 54 Kan. 403; *Fritz v. Pusey*, 31 Minn. 368; *Grice v. Scarborough*, 2 Speers (S. C.) 649, 42 Am. Dec. 391; *Sawyer v. Little*, 4 Vt. 414; *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201; *Edwards v. Clark*, 83 Mich. 246; *Demars v. Koehler*, 60 N. J. Law, 314.

<sup>275</sup> *Rawle, Covenants*, §§ 77, 78; *Lindley v. Dakin*, 13 Ind. 388; *Kellum v. Berkshire Life Ins. Co.*, 101 Ind. 455; *Demars v. Koehler*, 60 N. J. Law, 314; *James v. Lichfield*, L. R. 9 Eq. 51. And see *Pease v. Christ*, 31 N. Y. 141. But see, to the contrary, *Edwards v. Clark*, 83 Mich. 246.

As stated by the leading authority on the subject, the legal character of the outstanding right or interest is not always sufficient to determine whether it constitutes an incumbrance, within the particular covenant in question, but in a certain class of cases the question must "be determined by reference to the subject-matter of the contract, the relation of the parties to it and to each other, the notice on the part of the purchaser, and, to some extent, the local usage and habit of the country."<sup>276</sup> Thus, as just stated, notice to the purchaser of an existing lease may be decisive as to whether it is an incumbrance, and likewise his knowledge of an easement has been held to show that it was not within the scope of the covenant.<sup>277</sup> So, in determining whether a certain incumbrance was intended to be within the covenant, the whole conveyance may, it seems, be considered, and not merely the clause containing the covenant. Thus, when the grantee assumes a mortgage on the land, the existence of such mortgage is not a breach of the covenant, though not expressly excepted therefrom,<sup>278</sup> and even in states where a highway is regarded as an incumbrance, though a conveyance of land as bounded by a highway passes the land to the center of the highway, subject to the highway use, the grantor is not liable under his covenant on account of such highway.<sup>279</sup>

But though the question of notice to the grantee may be important in determining whether an outstanding right is an incumbrance, it is no defense to an action on the covenant that he knew of the incumbrance.<sup>280</sup> Nor is extraneous evi-

<sup>276</sup> Rawle, Covenants, § 85.

<sup>277</sup> *Janes v. Jenkins*, 34 Md. 1; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85; *Memmert v. McKeen*, 112 Pa. St. 315. See *Barre v. Fleming*, 29 W. Va. 314.

<sup>278</sup> *Freeman v. Foster*, 55 Me. 508; *Watts v. Welman*, 2 N. H. 458.

<sup>279</sup> *Frost v. Angier*, 127 Mass. 212; *Patten v. Fitz*, 138 Mass. 456; *Holmes v. Danforth*, 83 Me. 139; *City of Cincinnati v. Brachman*, 35 Ohio St. 289.

<sup>280</sup> Rawle, Covenants, § 88; *Levett v. Withrington*, Lutw. 97; *Funk* (907)

dence properly admissible at law to show that there was an intention to except a certain incumbrance from the covenant,<sup>281</sup> though a mistake in this regard may be the subject for a reformation in a court of equity, or in a court of law having equitable powers.<sup>282</sup>

### § 398. Covenants for quiet enjoyment and of warranty.

The covenant that the covenantee shall quietly enjoy the premises conveyed without disturbance, and the covenant to warrant and defend the premises, termed, respectively, the covenants for "quiet enjoyment" and "of warranty," are substantially similar in effect, except when some variation is introduced by the particular language used.<sup>283</sup>

The modern covenant of warranty, by which one covenants that he will warrant and defend the premises unto the grantee against all lawful claims by third persons, is entirely different from the old common-law warranty, and is merely a

*v. Voneida*, 11 Serg. & R. (Pa.) 112, 14 Am. Dec. 617; *Hubbard v. Norton*, 10 Conn. 422, 431; *Grice v. Scarborough*, 2 Speers (S. C.) 649, 42 Am. Dec. 391; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Yancey v. Tatlock*, 93 Iowa, 386; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Burr v. Lamaster*, 30 Neb. 688, 27 Am. St. Rep. 428; *Long v. Moler*, 5 Ohio St. 272.

<sup>281</sup> Rawle, *Covenants*, § 88, p. 113, note; *Holley v. Younge*, 27 Ala. 203; *Spurr v. Andrew*, 6 Allen (Mass.) 420; *Flynn v. Bourneuf*, 143 Mass. 277, 58 Am. Rep. 135; *Long v. Moler*, 5 Ohio St. 271; *Butler v. Gale*, 27 Vt. 739; *Edwards v. Clark*, 83 Mich. 246; *Grice v. Scarborough*, 2 Speers (S. C.) 649, 42 Am. Dec. 391. In Indiana such evidence has, however, always been admitted. *Allen v. Lee*, 1 Ind. 58, 48 Am. Dec. 352; *Pitman v. Conner*, 27 Ind. 337. So in Illinois. *Sidders v. Riley*, 22 Ill. 109.

<sup>282</sup> Rawle, *Covenants*, § 88, p. 112; *Haire v. Baker*, 5 N. Y. 357; *Taylor v. Gilman*, 25 Vt. 413; *Van Wagner v. Van Nostrand*, 19 Iowa, 427.

<sup>283</sup> Rawle, *Covenants*, § 114; *Copeland v. McAdory*, 100 Ala. 553; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; *Mitchell v. Warner*, 5 Conn. 497; *Kramer v. Carter*, 136 Mass. 504.

personal covenant, a breach of which entitles one to the recovery of damages. It is not recognized in England, and appears to have arisen in this country from the fact that the early conveyances contained both personal covenants and a clause in the form of the common-law warranty, and that this latter, as it was no longer utilized as a real covenant, became incorporated in the clause containing the personal covenants, and so became itself a covenant of that character.<sup>284</sup>

A covenant for quiet enjoyment, when accompanying a lease for years, is, as before stated, broken only by an eviction by the lessor or by a third person under title paramount.<sup>285</sup> So, when such a covenant, or a covenant of warranty, occurs in a conveyance in fee, there can be no recovery unless there is an eviction either by the grantor<sup>286</sup> or by a third person under lawful claim of title.<sup>287</sup> Accordingly it is not broken by a tortious disturbance or eviction by a stranger; this being something beyond the control of the grantor, and for which the grantee has his remedy against the wrongdoer.<sup>288</sup> A tortious eviction by the covenantor, however, constitutes a breach of the covenant,<sup>289</sup> though his wrongful en-

<sup>284</sup> Rawle, Covenants, §§ 110-114.

<sup>285</sup> See ante, § 43 (b).

<sup>286</sup> See post, note 289.

<sup>287</sup> *Bostwick v. Williams*, 36 Ill. 35, 85 Am. Dec. 385; *Knapp v. Town of Marlboro*, 34 Vt. 235; *Burrus v. Wilkinson*, 31 Miss. 537; *Kent v. Welch*, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266; *Johnson v. Nyce's Ex'rs*, 17 Ohio, 66, 49 Am. Dec. 444; *McGrew v. Harmon*, 164 Pa. St. 115; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279.

<sup>288</sup> *Hayes v. Bickerstaff*, Vaughan, 118; *Noonan v. Lee*, 2 Black (U. S.) 499; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330; *Barry v. Guild*, 126 Ill. 439; *Hoppes v. Cheek*, 21 Ark. 585; *Playter v. Cunningham*, 21 Cal. 229; *Chestnut v. Tyson*, 105 Ala. 149. But a covenant against the acts of a certain person applies to his tortious, as well as his rightful, acts. Rawle, Covenants, § 128; *Foster v. Mapes*, Cro. Eliz. 212.

<sup>289</sup> Rawle, Covenants, § 128; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Akerly v. Vilas*, 23 Wis. 207, 99 Am. Dec. 165.

try on the premises without claiming title, or without doing such acts as amount to an assertion of title, is regarded as a mere trespass not amounting to an eviction.<sup>290</sup> A taking of the land under the power of eminent domain is not within the scope of the covenant, which is regarded as directed against defects of title only.<sup>291</sup>

An eviction constituting a breach of one of these covenants may be actual or constructive, the first involving a withdrawal by the covenantee from the possession of the land, the latter not involving any loss of the possession. To constitute an actual eviction, the dispossession need not be under legal process,<sup>292</sup> nor need there be any judicial decision in favor of the holder of the paramount title,<sup>293</sup> it being sufficient that the claim is actually asserted,<sup>294</sup> that it is valid,<sup>295</sup> and that the covenantee yields thereto.<sup>296</sup>

<sup>290</sup> *Crosse v. Young*, 2 Show. 425; *Claunch v. Allen*, 12 Ala. 159; *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680. See ante, § 51.

<sup>291</sup> *Rawle, Covenants*, § 129; *Frost v. Earnest*, 4 Whart. (Pa.) 86; *Brimmer v. City of Boston*, 102 Mass. 19; *Cooper v. Bloodgood*, 32 N. J. Eq. 209; *Stevenson v. Loehr*, 57 Ill. 509, 11 Am. Rep. 36; *Folts v. Huntley*, 7 Wend. (N. Y.) 210.

<sup>292</sup> *Rawle, Covenants*, § 132; *Foster v. Pierson*, 4 Term R. 617; *Greenvault v. Davis*, 4 Hill (N. Y.) 645; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *Hodges v. Latham*, 98 N. C. 239, 2 Am. St. Rep. 333.

<sup>293</sup> *Hamilton v. Cutts*, 4 Mass. 350, 3 Am. Dec. 222; *Mason v. Cooksey*, 51 Ind. 519; *Dugger v. Oglesby*, 99 Ill. 405.

<sup>294</sup> There can be no eviction unless the adverse claim is actually asserted, and consequently the covenant is not broken if the covenantee yields possession before any assertion of such claim. *Axtel v. Chase*, 83 Ind. 546; *Hester v. Hunnicutt*, 104 Ala. 282; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *McGrew v. Harmon*, 164 Pa. St. 122; *Kellog v. Platt*, 33 N. J. Law, 328; *Morgan v. Henderson*, 2 Wash. T. 367; *Rawle, Covenants*, § 135.

<sup>295</sup> See *Rawle, Covenants*, § 136, and cases cited ante, note 287.

<sup>296</sup> *Hamilton v. Cutts*, 4 Mass. 350, 3 Am. Dec. 222; *Axtel v. Chase*, 83 Ind. 546; *Gunter v. Williams*, 40 Ala. 561; *Allis v. Nininger*, 25 Minn. 525; *Lambert v. Estes*, 99 Mo. 604; *Clements v. Collins*, 59 (910)



A constructive eviction occurs when, upon the assertion of the superior title, the covenantee, instead of yielding possession to the hostile claimant, buys in such title, or accepts a lease from the holder thereof.<sup>297</sup> A constructive eviction also occurs when the covenantee is unable, upon receiving the conveyance, to obtain possession of the land, owing to the fact that another person, having a superior title thereto, is in possession, it being considered unnecessary, in such a case, that the covenantee should be compelled to take forcible possession in order that he himself may be ejected, or to bring a suit for the land, which would necessarily result adversely to him.<sup>298</sup>

### § 399. Covenant for further assurance.

The covenant by the grantor to make such other assurances as may be necessary to perfect the title is less extensively used in the United States than any of the other covenants for title, though its importance to the purchaser, it is said,

Ga. 124; *Wilson v. Cochran*, 46 Pa. St. 229; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 337; *Kramer v. Carter*, 136 Mass. 504.

<sup>297</sup> Rawle, Covenants, § 142 et seq.; *Sprague v. Baker*, 17 Mass. 590; *Dillahunt v. Little Rock & Ft. S. Ry. Co.*, 59 Ark. 629; *McConnell v. Downs*, 48 Ill. 271; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Hodges v. Latham*, 98 N. C. 239, 2 Am. St. Rep. 333; *Loomis v. Bedel*, 11 N. H. 74; *Clark v. Mumford*, 62 Tex. 531; *Amos v. Cosby*, 74 Ga. 793. See *Tucker v. Cooney*, 34 Hun, 227, 102 N. Y. 719; *Stewart v. Drake*, 9 N. J. Law, 139, *Finch's Cas.* 1100. In one or two states a different view is taken. *Dyer v. Britton*, 53 Miss. 270; *Huff v. Cumberland Valley Land Co.*, 17 Ky. Law Rep. 213, 30 S. W. 660.

<sup>298</sup> Rawle, Covenants, § 138 et seq.; *Cloake v. Hooper*, *Freem.* 122; *Grist v. Hodges*, 14 N. C. 200; *Peters v. Bowman*, 98 U. S. 56; *Banks v. Whitehead*, 7 Ala. 83; *Shattuck v. Lamb*, 65 N. Y. 499; *Moore v. Vail*, 17 Ill. 185; *Cummins v. Kennedy*, 3 Litt. (Ky.) 118, 14 Am. Dec. 45; *Sheffey's Ex'r v. Gardiner*, 79 Va. 313; *Witty v. Hightower*, 12 Smedes & M. (Miss.) 478; *Murphy v. Price*, 48 Mo. 247; *Heyn v. Ohman*, 42 Neb. 693.

"can hardly be overrated."<sup>299</sup> Under this covenant, the covenantor may be required to do such further acts as may be necessary on his part to perfect the title which the conveyance purports to pass, but the covenantee cannot demand that he do acts which are unnecessary, or which it is impossible for him to do. The remedy under this covenant is more often by a suit for specific performance than by an action of damages, as in the case of the other covenants.<sup>300</sup>

#### § 400. The measure of damages.

In an action for a breach of a covenant for seisin or for right to convey, the measure of damages is, it is agreed, the amount of the consideration paid by the grantee, usually with interest, such consideration being presumably the value of the land at the time of the sale, with a view to which the covenant was made.<sup>301</sup> In case the breach is as to part of the premises only, the recovery is a proportionate part of the consideration.<sup>302</sup>

<sup>299</sup> Rawle, Covenants for Title, § 98. See *Cochran v. Pascault*, 54 Md. 1.

<sup>300</sup> Rawle, Covenants, §§ 99-109. The fact that this covenant may be enforced by specific performance, while the other covenants for title cannot, is the reason, as stated by Mr. Rawle, of its great value to the purchaser.

<sup>301</sup> Rawle, Covenants, § 158 et seq.; *Bender v. Fromberger*, 4 Dall. (Pa.) 442; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1; *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Nichols v. Walter*, 8 Mass. 243; *Mitchell v. Hazen*, 4 Conn. 516, 10 Am. Dec. 169; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *King v. Gilson's Adm'x*, 32 Ill. 348, 83 Am. Dec. 269; *Cummins v. Kennedy*, 3 Litt. (Ky.) 118, 14 Dec. 45; *Backus' Adm'rs v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585; *Shorthill v. Ferguson*, 44 Iowa, 249; *Park v. Cheek*, 4 Cold. (Tenn.) 20. As to interest, see Rawle, Covenants, § 196.

<sup>302</sup> *Cushman v. Blanchard*, 2 Me. 266, 11 Am. Dec. 76; *Hubbard v. Norton*, 10 Conn. 422; *Bibb v. Freeman*, 59 Ala. 612; *Weber v. Anderson*, 73 Ill. 439; *Wright v. Nipple*, 92 Ind. 310; *Scantlin v. Allison*, 12 Kan. 85; *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Adkins* (912)

The measure of damages for a breach of a covenant for quiet enjoyment or of warranty is, by the weight of authority, the same as that for breach of the covenants of seisin or of right to convey,—that is, the value of the land at the time of the conveyance, as measured by the consideration paid, without reference to any increase in value, whether caused by the development of the neighborhood or the improvement of the land itself.<sup>303</sup> In some of the New England states, however, the covenants for quiet enjoyment and of warranty are regarded as intended to indemnify the covenantee for any loss suffered by him, and as consequently entitling him to damages to the extent of the value of the land at the time of the eviction.<sup>304</sup> Such a rule may involve a very great burden upon one who sells land his title to which is defective, though he believes it to be good, he being liable for the cost of all improvements, however great, made by his grantee, as well as for any increase in value arising from growth of population and the like causes.<sup>305</sup>

The covenant against incumbrances is considered as one for indemnity only, and the covenantee can recover no more than what he was compelled to pay in order to extinguish

v. Tomlinson, 121 Mo. 487; *Staats v. Ten Eyck's Ex'rs*, 3 Caines (N. Y.) 111, 2 Am. Dec. 254; *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115.

<sup>303</sup> Rawle, *Covenants for Title*, § 164; *Burton v. Reeds*, 20 Ind. 87; *Weber v. Anderson*, 73 Ill. 439; *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13; *Bennet v. Jenkins*, 13 Johns. (N. Y.) 50; *Brown v. Dickerson*, 12 Pa. St. 372; *Swafford v. Whipple*, 3 G. Greene (Iowa) 261, 54 Am. Dec. 498; *Clark v. Parr*, 14 Ohio, 118, 45 Am. Dec. 529; *Elliott v. Thompson*, 4 Humph. (Tenn.) 99, 40 Am. Dec. 630.

<sup>304</sup> *Horsford v. Wright*, Kirby (Conn.) 3, 1 Am. Dec. 8; *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Ceconi v. Rodden*, 147 Mass. 64; *Park v. Bates*, 12 Vt. 381, 36 Am. Dec. 347; *Williamson v. Williamson*, 71 Me. 442.

<sup>305</sup> See Rawle, *Covenants*, §§ 165-171.

the outstanding incumbrance,<sup>306</sup> or, in case he could not so extinguish it, the amount of injury which he may be considered to have suffered from its existence.<sup>307</sup> If no loss has been sustained, however, he may recover nominal damages, since the covenant is regarded as broken as soon as made, if there is any outstanding incumbrance.<sup>308</sup> In those states in which the recovery on a covenant for quiet enjoyment or of warranty is limited to the amount of the consideration paid, the recovery for breach of the covenant against incumbrances is likewise so limited, no matter what expenditure or loss the covenantee may have incurred on account of the incumbrance.<sup>309</sup>

#### § 401. Covenants running with the land.

The benefit of a covenant for title until breach runs with the land.<sup>310</sup> Upon breach, the covenant is changed into a

<sup>306</sup> Rawle, Covenants, § 188 et seq.; *Delavergne v. Norris*, 7 Johns. (N. Y.) 358, 5 Am. Dec. 281; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Amos v. Cosby*, 74 Ga. 793; *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761; *McDowell v. Milroy*, 69 Ill. 498; *Kellogg v. Malin*, 62 Mo. 429; *Corbett v. Wrenn*, 25 Or. 305; *Eaton v. Lyman*, 30 Wis. 41; *Johnson v. Collins*, 116 Mass. 392; *Hartshorn v. Cleveland*, 52 N. J. Law, 473; *Myers v. Brodbeck*, 110 Pa. St. 198. See *Guthrie v. Russell*, 46 Iowa, 269, 26 Am. Rep. 135.

<sup>307</sup> Rawle, Covenants, §§ 190, 191; *Mitchell v. Stanley*, 44 Conn. 312; *Morgan v. Smith*, 11 Ill. 194; *Kostendader v. Pierce*, 37 Iowa, 645; *Wetherbee v. Bennett*, 2 Allen (Mass.) 428; *Mackey v. Harmon*, 34 Minn. 168; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Kellogg v. Malin*, 62 Mo. 429.

<sup>308</sup> *Briggs v. Morse*, 42 Conn. 258; *Stowell v. Bennett*, 34 Me. 422; *Wilcox v. Musche*, 39 Mich. 101; *Smith v. Jefts*, 44 N. H. 482; *Walker's Adm'r v. Deaver*, 79 Mo. 664; *Funk v. Voneida*, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617; *Noonan v. Ilsley*, 21 Wis. 138; Rawle, Covenants, §§ 188, 189.

<sup>309</sup> Rawle, Covenants, § 193; *Collier v. Cowger*, 52 Ark. 322; *Foote v. Burnet*, 10 Ohio, 317, 36 Am. Dec. 90; *Guthrie v. Russell*, 46 Iowa, 269, 26 Am. Rep. 135; *Eaton v. Lyman*, 30 Wis. 41; *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 142.

<sup>310</sup> Rawle, Covenants, § 204.



mere personal right of action, to be enforced by the person entitled to the benefit of the covenant at the time of the breach, or, in case of his death, his personal representative, and which consequently does not pass with the land to his heir, or to his grantee, unless there is an express assignment of the right of action.<sup>311</sup>

Covenants for quiet enjoyment and of warranty are not, it is agreed, broken until there is an eviction thereunder, and consequently they may be enforced by any subsequent owner of the land claiming under the covenantee, whether a grantee, heir, or devisee,<sup>312</sup> though the right of action for a covenant already broken does not so pass with the land. So, a covenant for further assurance is not regarded as broken until damage has been caused by refusal to furnish the assurance, and there is consequently a right of action thereon in favor of a subsequent owner of the land.<sup>313</sup>

The covenants of seisin and of right to convey,<sup>314</sup> and also the covenant against incumbrances,<sup>315</sup> have, however, in the

<sup>311</sup> *Lewes v. Ridge*, Cro. Eliz. 863, 3 Gray's Cas. 590; *Lucy v. Levington*, 2 Lev. 26, 3 Gray's Cas. 591; *Davis v. Lyman*, 6 Conn. 249; *Ladd v. Noyes*, 137 Mass. 151; *Adams v. Conover*, 87 N. Y. 422; *Davidson v. Cox*, 10 Neb. 150; *Provident Life & Trust Co. v. Fiss*, 147 Pa. St. 232; *Clement v. Bank of Rutland*, 61 Vt. 298; *Peters v. Bowman*, 98 U. S. 56; *Rawle, Covenants*, §§ 316, 317.

<sup>312</sup> *Rawle, Covenants*, § 213 et seq.; *Claycomb v. Munger*, 51 Ill. 373; *Redwine v. Brown*, 10 Ga. 311; *Wyman v. Ballard*, 12 Mass. 304; *Suydam v. Jones*, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; *King v. Kerr's Adm'rs*, 5 Ohio, 154, 22 Am. Dec. 777; *Lawrence v. Senter*, 4 Sneed (Tenn.) 52; *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95.

<sup>313</sup> *Rawle, Covenants*, § 230; *Colby v. Osgood*, 29 Barb. (N. Y.) 339, *Finch's Cas.* 1103; *Collier v. Gamble*, 10 Mo. 467.

<sup>314</sup> *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379, 3 Gray's Cas. 598; *Mitchell v. Warner*, 5 Conn. 498, *Finch's Cas.* 1094; *Mygatt v. Coe*, 124 N. Y. 212; *Lawrence v. Montgomery*, 37 Cal. 188; *Chapman v. Holmes' Ex'rs*, 10 N. J. Law, 20; *Ballard v. Child*, 34 Me. 355; *Clement v. Bank of Rutland*, 61 Vt. 298.

<sup>315</sup> *Mitchell v. Warner*, 5 Conn. 498, *Finch's Cas.* 1094; *Clark v. Swift*, 3 Metc. (Mass.) 390, 3 Gray's Cas. 611; *Carter v. Denman's*



majority of the states in this country, been regarded as broken as soon as made,—that is, it is considered that, since these involve stipulations that a certain state of things exists at the time of the conveyance, the nonexistence thereof causes an immediate breach. In some states, however,<sup>316</sup> as in England,<sup>317</sup> the courts have not adopted this view, but allow an action to be brought on either of these covenants by any owner of the land who suffers special damage by the breach; and in other states there are statutory provisions to this effect.<sup>318</sup> But even in states in which it is held that there is no right of action on the covenants in favor of an assignee, it seems that he may sue thereon in the name of his grantor, under the equitable rule, largely adopted by courts of law, that the assignee of a chose in action may sue in the name of the assignor,<sup>319</sup> and the same result has been occasionally held to follow from modern statutes extending the right of assignment, and allowing an action in the name of the real party in interest.<sup>320</sup>

Ex'rs, 23 N. J. Law, 260; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Lawrence v. Montgomery*, 37 Cal. 183; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Guerin v. Smith*, 62 Mich. 369; *Blondeau v. Sheridan*, 81 Mo. 545; *Marbury v. Thornton*, 82 Va. 702. See *Stewart v. Drake*, 9 N. J. Law, 139, *Finch's Cas.* 1100.

<sup>316</sup> *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Dehority v. Wright*, 101 Ind. 382; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Schofield v. Iowa Homestead Co.*, 32 Iowa, 318, 7 Am. Rep. 197; *Mecklem v. Blake*, 22 Wis. 495; *Cole v. Kimball*, 52 Vt. 639, 3 Gray's Cas. 615. (covenant against incumbrances). See *Allen v. Kennedy*, 91 Mo. 324.

<sup>317</sup> *Kingdon v. Nottle*, 1 Maule & S. 355, 3 Gray's Cas. 592; *King v. Jones*, 5 Taunt, 418, 3 Gray's Cas. 595; *Kingdon v. Nottle*, 4 Maule & S. 53, 3 Gray's Cas. 596.

<sup>318</sup> See Rawle, Covenants, § 211; 1 Stimson's Am. St. Law, § 1461.

<sup>319</sup> Rawle, Covenants, § 226. See *Peters v. Bowman*, 98 U. S. 59; *Cole v. Kimball*, 52 Vt. 643, 3 Gray's Cas. 615. As to a suit on a covenant against incumbrances in the name of the assignor, and the difficulties of pleading therein, see Rawle, Covenants, § 227.

<sup>320</sup> *Security Bank of Minnesota v. Holmes*, 65 Minn. 531; *Kimball v. Bryant*, 25 Minn. 496; *Boyd v. Belmont*, 58 How. Pr. (N. Y.) 514.

The right of a remote grantee to sue upon a covenant of title as running with the land is not affected by the fact that he also has a right of action on a covenant made directly with himself by his immediate grantor.<sup>321</sup>

In order to avoid the possibility of two or more judgments against the covenantor on account of the same breach in favor of successive owners of the land, the rule has been laid down and generally adopted that neither the covenantee nor a subsequent owner, after parting with the land, can recover on the covenant until he has himself been compelled to pay damages on his own covenant, in favor of one claiming under him, this being regarded as tantamount to an eviction.<sup>322</sup>

The covenantee or other owner of the land cannot, unless in special cases, after having conveyed the land, release the covenant, so as to affect the right of his grantee to sue thereon,<sup>323</sup> and it has been suggested that such a release by the covenantee, even though made by him while owner of the land, does not affect the right of action in favor of a subsequent transferee of the land who takes without notice of the release.<sup>324</sup>

<sup>321</sup> *Withy v. Mumford*, 5 Cow. (N. Y.) 137, 3 Gray's Cas. 607; *Markland v. Crump*, 18 N. C. 101, 27 Am. Dec. 230; Rawle, Covenants, § 216.

<sup>322</sup> *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233, 3 Gray's Cas. 601; *Withy v. Mumford*, 5 Cow. (N. Y.) 137, 3 Gray's Cas. 607; *Chase v. Weston*, 12 N. H. 413; *Markland v. Crump*, 18 N. C. 94, 27 Am. Dec. 230; *Clement v. Bank of Rutland*, 61 Vt. 298; *Wheeler v. Sohler*, 3 Cush. (Mass.) 222; *Redwine v. Brown*, 10 Ga. 311; Rawle, Covenants, § 216.

<sup>323</sup> *Abby v. Goodrich*, 3 Day (Conn.) 433; *Claycomb v. Munger*, 51 Ill. 373; *Crooker v. Jewell*, 29 Me. 527; *Chase v. Weston*, 12 N. H. 413.

<sup>324</sup> See *Claycomb v. Munger*, 51 Ill. 373; *Susquehanna & Wyoming Valley Railroad & Coal Co. v. Quick*, 61 Pa. St. 339; *Field v. Snell*, 4 Cush. (Mass.) 504. Contra, see *Littlefield v. Getchell*, 32 Me. 392.

## V. EXECUTION OF THE CONVEYANCE.

A conveyance must be signed, and, in many jurisdictions, must be sealed. In some jurisdictions it must be witnessed.

An acknowledgment of the conveyance by the grantor before some official is usually required only in order to entitle it to record, though in some states a conveyance, or a particular class of conveyance, must be acknowledged to be valid.

There must be a delivery of the conveyance in order that it may be effective, this being the expression, by word or act, of the grantor's intention that the conveyance shall take effect as a transfer of title. This expression of intention may be valid, though the grantee is not present.

A delivery in escrow is a manual transfer of the instrument to one other than the grantee, subject to a stipulation that the conveyance shall not take effect until a certain condition is fulfilled.

In a number of the states no title is regarded as passing by the conveyance until the grantee assents thereto. In other states, as in England, there is no such rule.

The execution of a conveyance, including delivery thereof, may be by an agent acting under a "power of attorney."

### § 402. Signing.

At common law, a written transfer of land was always sealed, but not signed. In England, the better opinion is that the requirement in the Statute of Frauds that the writing be signed does not apply to a sealed instrument.<sup>325</sup> In this country, however, the state statute requiring a signed

<sup>325</sup> *Cherry v. Heming*, 4 Exch. 631; *Cooch v. Goodman*, 2 Q. B. 580, 597; *Aveline v. Whisson*, 4 Man. & G. 801; 3 *Preston, Abstracts*, 61; *Challis, Real Prop.* 327. The statute in terms (29 Car. II. c. 3, § 1) provides that all leases, estates, interests of freehold, terms of years, etc., "made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only."

writing for the transfer of an interest in land is usually, if not invariably, construed as requiring the writing to be signed, although it also be sealed.<sup>326</sup> In the absence of a statutory requirement that the instrument be "subscribed" by the grantor, the signature may, it has been held, be in any part thereof.<sup>327</sup>

The signing may be by mark, although the person so signing is able to write,<sup>328</sup> or may be by the hand of another person in the grantor's presence.<sup>329</sup> Even a signature by another, made out of the grantor's presence,<sup>330</sup> is sufficient if adopted by the grantor, as when he subsequently acknowledges or delivers the instrument as his act and deed.

When the conveyance purports to be by more than one grantor, but all the grantors do not sign, the signatures of those that do, followed by delivery by them, will be sufficient

<sup>326</sup> *Adams v. Medsker*, 25 W. Va. 127; *Goodman v. Randall*, 44 Conn. 321; *Shillock v. Gilbert*, 23 Minn. 386; *Isham v. Bennington Iron Co.*, 19 Vt. 230; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193.

<sup>327</sup> *Saunders v. Hackney*, 10 Lea (Tenn.) 194; *Newton v. Emerson*, 66 Tex. 142; *Smith v. Howell*, 11 N. J. Eq. 349; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *Devereux v. McMahon*, 108 N. C. 134.

<sup>328</sup> *Meazels v. Martin*, 93 Ky. 50; *Devereux v. McMahon*, 108 N. C. 134; *Truman v. Lore's Lessee*, 14 Ohio St. 144; *Mackay v. Easton*, 19 Wall. (U. S.) 619.

<sup>329</sup> *Lewis v. Watson*, 98 Ala. 479; *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193, note; *Bird v. Decker*, 64 Me. 550; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *McMurtry v. Brown*, 6 Neb. 368; *Hays v. Hays*, 6 Pa. St. 368.

<sup>330</sup> *Nye v. Lowry*, 82 Ind. 316; *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386; *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92; *Conlan v. Grace*, 36 Minn. 276; *Pierce v. Hakes*, 23 Pa. St. 231; *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Newton v. Emerson*, 66 Tex. 142.

to divest their interest,<sup>331</sup> unless their delivery was conditional upon signature by the others.<sup>332</sup>

### § 403. Sealing—Necessity.

At common law, the only recognized mode of authenticating a written instrument was by sealing, and consequently any conveyance in use at the present day which takes effect by the common law, such as a grant of a right in another's land, or a release, must be under seal, in the absence of a statutory provision to the contrary.<sup>333</sup>

In a number of the states, by express provision of statute, seals are no longer necessary, and the presence of a seal on a conveyance does not affect the acquisition of rights thereunder.<sup>334</sup> In other states there is an express requirement that a transfer of an interest in land shall be under seal.<sup>335</sup>

Since, after the passage of the Statute of Uses, a conveyance by bargain and sale might be oral, the mere payment of a consideration being sufficient to raise a use, which the statute would execute,<sup>336</sup> and since, moreover, the Statute of Enrollments, passed in recognition of this fact, and requiring a

<sup>331</sup> *Colton v. Leavey*, 22 Cal. 496; *Jackson v. Sanford*, 19 Ga. 14; *Scott v. Whipple*, 5 Me. 336; *Harrelson v. Sarvis*, 39 S. C. 14.

<sup>332</sup> *Johnson v. Brook*, 31 Miss. 17; *Arthur v. Anderson*, 9 Rich. (S. C.) 234; *Haskins v. Lombard*, 16 Me. 140, 33 Am. Dec. 645. See post, § 406.

<sup>333</sup> *Somerset v. Fogwell*, 5 Barn. & C. 875, 3 Gray's Cas. 230; *Wood v. Leadbitter*, 13 Mees. & W. 838, 2 Gray's Cas. 359; *Hewlins v. Shipham*, 5 Barn. & C. 229; *Arnold v. Stevens*, 24 Pick. (Mass.) 109, 35 Am. Dec. 305; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484; *Huff v. McCauley*, 53 Pa. St. 206, 91 Am. Dec. 203; *Cagle v. Parker*, 97 N. C. 271.

<sup>334</sup> 1 *Stimson's Am. St. Law*, § 1564 (B). See *Wisdom v. Reeves*, 110 Ala. 418; *Pierson v. Armstrong*, 1 Iowa, 283, 63 Am. Dec. 440; *Jerome v. Ortman*, 66 Mich. 668; *Gibbs v. McGuire*, 70 Miss. 646.

<sup>335</sup> 1 *Stimson's Am. St. Law*, § 1564 (A).

<sup>336</sup> *Challis*, *Real Prop.* 338; *Williams*, *Real Prop.* (18th Ed.) 196; 1 *Hayes*, *Conveyancing* (5th Ed.) 76.



bargain and sale to be by writing under seal and enrolled, has been generally regarded as not in force in this country, it would seem that a seal is unnecessary, in the absence of a state statute to the contrary, in the case of a conveyance taking effect under the Statute of Uses or under a state statute. In a number of the states, however, it has been decided or assumed that, even in the absence of a local statutory requirement, a seal is necessary, this view being sometimes based upon the assumption that a conveyance of land is necessarily a "deed," which, since a deed means a sealed instrument, assumes the very point in question.<sup>337</sup>

Even when a seal is necessary to convey the legal title, an unsealed conveyance will be effective in equity, as vesting an equitable interest in the grantee named.<sup>338</sup>

#### — Sufficiency.

At common law, an instrument was sealed, usually at least, by impressing some device upon wax, which was made to adhere to the paper;<sup>339</sup> but at the present day an impression made by stamping upon the paper on which the instrument is written,<sup>340</sup> or even a paper wafer or piece of paper gummed

<sup>337</sup> *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *McLaughlin v. Randall*, 66 Me. 226; *Jackson v. Hart*, 12 Johns. (N. Y.) 77; *Robinson v. Noel*, 49 Miss. 253; *Switzer v. Knapps*, 10 Iowa, 72, 74 Am. Dec. 375; *Colvin v. Warford*, 20 Md. 357. In *Underwood v. Campbell*, 14 N. H. 393, it seems to be considered that the Statute of Enrollments is in force in New Hampshire.

<sup>338</sup> *Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224; *Brinkley v. Bethel*, 9 Heisk. (Tenn.) 786; *Jewell v. Harding*, 72 Me. 124; *Frost v. Wolf*, 77 Tex. 455, 19 Am. St. Rep. 761; *McCarley v. Tippah County Sup'rs*, 58 Miss. 483; *Switzer v. Knapps*, 10 Iowa, 72, 74 Am. Dec. 375.

<sup>339</sup> 3 Co. Inst. 169.

<sup>340</sup> *Sugden, Powers* (8th Ed.) 232; *Pillow v. Roberts*, 12 Ark. 822; *Allen v. Sullivan R. Co.*, 32 N. H. 446; *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. 52, 3 Gray's Cas. 630; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *Pillow v. Roberts*, 13 How. (U. S.) 472. Contra, *Bank of Rochester v. Gray*, 2 Hill (N. Y.) 227; *Warren v. Lynch*, 5 Johns. (N. Y.) 239. See 1 Am. Law Rev. 638.

on the face of the instrument,<sup>341</sup> is usually regarded as sufficient. By statute in many states, a mere scroll or any other device marked on the paper on which the conveyance is written is sufficient,<sup>342</sup> and in other states a similar view is taken, in the absence of any express statute.<sup>343</sup> So, the writing of the word "Seal" in connection with the signature has been regarded as a sufficient sealing.<sup>344</sup>

A recital in the instrument that it is sealed is not necessary in order to make the sealing effective, if there is actually a seal.<sup>345</sup> In a few decisions, however, a different view has been taken when the alleged seal consisted of merely a scroll or other device which did not of itself show that it was affixed as a seal.<sup>346</sup> A statement in the instrument that it is

<sup>341</sup> *Tasker v. Bartlett*, 5 Cush. (Mass.) 359; *Turner v. Field*, 44 Mo. 382; *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. 52, 3 Gray's Cas. 630.

<sup>342</sup> 1 Stimson's Am. St. Law, § 1565.

<sup>343</sup> *Jones v. Logwood*, 1 Wash. (Va.) 42; *Hacker's Appeal*, 121 Pa. St. 192; *Trasher v. Everhart*, 3 Gill & J. (Md.) 246; *Hudson v. Poin-dexter*, 42 Miss. 304; *Eames v. Preston*, 20 Ill. 389; *Relph v. Gist*, 4 McCord (S. C.) 267. Contra, *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *McLaughlin v. Randall*, 66 Me. 226; *Douglas v. Oldham*, 6 N. H. 150; *Bates v. Boston & N. Y. C. R. Co.*, 10 Allen (Mass.) 251, 3 Gray's Cas. 628.

<sup>344</sup> *Cochran v. Stewart*, 57 Minn. 499; *Whiteley v. Davis' Lessee*, 1 Swan (Tenn.) 333.

The word "Seal" within a scroll has been decided to be sufficient in some cases. *Hastings v. Vaughn*, 5 Cal. 315; *Miller v. Binder*, 28 Pa. St. 489; *English v. Helms*, 4 Tex. 228. Contra, *Beardsley v. Knight*, 4 Vt. 471.

<sup>345</sup> *Wing v. Chase*, 35 Me. 260; *Devereux v. McMahon*, 108 N. C. 134; *Proprietors of Mill Dam Foundry Co. v. Hovey*, 21 Pick. (Mass.) 417, 428; *Taylor v. Glaser*, 2 Serg. & R. (Pa.) 502; *Comyns*, Dig. "Fait" (A 2).

<sup>346</sup> *Bohannon v. Hough*, 1 Miss. 461; *Cromwell v. Tate's Ex'r*, 7 Leigh (Va.) 301, 30 Am. Dec. 506; *Corlies v. Vannote*, 16 N. J. Law, 324; *Carter v. Penn*, 4 Ala. 140. And see *Buckingham v. Orr*, 6 Colo. 587. Compare *Ashwell v. Ayres*, 4 Grat. (Va.) 283.

sealed will not be sufficient as a substitute for a seal.<sup>347</sup> The seal need not, and in fact usually is not, affixed at the same time as or after the signing of the instrument, it being sufficient that the party adopts, expressly or impliedly, the seal already placed on the paper.<sup>348</sup> So, each of the parties executing the instrument need not have a separate seal, one seal being sufficient if adopted by all the parties signing.<sup>349</sup>

#### § 404. Witnesses.

In some states witnesses, usually two in number, are necessary in order to make a conveyance valid as between the parties thereto. In other states, no witnesses are required, while in some, though witnesses are not necessary to render the conveyance valid as between the parties, they are necessary for the purpose of proving the deed for record, in the absence of an acknowledgment by the grantor.<sup>350</sup> The witness need not be present at the actual signing of the instrument by the grantor, provided the latter acknowledges to him that it is his act, and expressly or impliedly requests him to attest the instrument.<sup>351</sup> The witnesses must sign the in-

<sup>347</sup> *Deming v. Bullitt*, 1 Blackf. (Ind.) 241; *McPherson v. Reese*, 58 Miss. 749; *Mitchell v. Parham*, Harp. (S. C.) 3; *Davis v. Judd*, 6 Wis. 85; *Taylor v. Glaser*, 2 Serg. & R. (Pa.) 502.

<sup>348</sup> *Sheppard's Touchstone*, 54, 57; *Reg. v. Inhabitants of St. Paul*, 7 Q. B. 232; *Ball v. Dunsterville*, 4 Term R. 313; *Ashwell v. Ayres*, 4 Grat. (Va.) 283.

<sup>349</sup> *Carter v. Chaudron*, 21 Ala. 88; *Davis v. Burton*, 4 Ill. 41, 36 Am. Dec. 511; *Northumberland v. Cobleigh*, 59 N. H. 250; *Pickens v. Rymer*, 90 N. C. 283, 47 Am. Rep. 521; *Lunsford v. La Motte Lead Co.*, 54 Mo. 426; *Yale v. Flanders*, 4 Wis. 96; *Bowman v. Robb*, 6 Pa. St. 302; *Bradford v. Randall*, 5 Pick. (Mass.) 496; *Lambden v. Sharp*, 9 Humph. (Tenn.) 224.

<sup>350</sup> 1 *Stimson's Am. St. Law*, § 1566.

<sup>351</sup> *Jackson v. Phillips*, 9 Cow. (N. Y.) 94, 113; *Tate v. Lawrence*, 11 Heisk. (Tenn.) 503; *Clements v. Pearce*, 63 Ala. 284; *Mulloy v. Ingalls*, 4 Neb. 115. See *Little v. White*, 29 S. C. 170; *Poole v. Jackson*, 66 Tex. 380; 1 *Stimson's Am. St. Law*, § 1567.

strument, their signatures being usually placed under a clause, "Signed, sealed, and delivered in the presence of."<sup>352</sup>

The statutes have usually been construed as requiring that the witness be competent, at the time of his attestation of the conveyance, to testify in regard to its execution in case of litigation between the parties, with the result that his attestation is of no effect for the purpose of validating the conveyance if he is not so competent.<sup>353</sup>

### § 405. Acknowledgment.

In some states the statute requires a conveyance to be acknowledged by the grantor before an official in order to make it effective even as between the parties. More usually, however, the requirement of acknowledgment is imposed only as a preliminary to the record of a conveyance for the purpose of charging a subsequent purchaser with notice thereof. The acknowledgment has, moreover, in a number of states, the effect of rendering the conveyance admissible in evidence without further proof of its execution.<sup>354</sup>

The statutes require the acknowledgment to be made before an official named, usually a judge, clerk of court, justice of the peace, or notary public, and he must write upon the

<sup>352</sup> The signature of the witness, it has been decided, may be by mark. *Brown v. McCormick*, 28 Mich. 215; *Devereux v. McMahon*, 102 N. C. 284.

<sup>353</sup> So it has been held that one having a pecuniary interest in the conveyance is disqualified. *Winsted Sav. Bank & Building Ass'n v. Spencer*, 26 Conn. 195; *Child v. Baker*, 24 Neb. 188. And a grantor cannot witness the execution of the instrument by his co-grantor.

A wife or husband of a grantor has also been regarded as disqualified. *Third Nat. Bank of Chattanooga v. O'Brien*, 94 Tenn. 38; *Johnston v. Slater*, 11 Grat. (Va.) 321; *Corbett v. Norcross*, 35 N. H. 99. But in some states it has been held that the witness need not be competent to testify at the time of its execution, provided he can testify when called to prove the execution in court. *Frink v. Pond*, 46 N. H. 125; *Doe d. Johnson v. Turner*, 7 Ohio, 216, pt. 2.

<sup>354</sup> 1 Stimson's Am. St. Law, §§ 1570-1572.

instrument his certificate that the acknowledgment was made, and usually it is required that the certificate state that the identity of the party making the acknowledgment was known to him. This certificate must be signed by the official, and, when he has an official seal, must be sealed by him.<sup>355</sup>

— By married woman.

In many states, a conveyance in which a married woman joins, whether for the purpose of conveying her own property, or in order to release her rights in her husband's property, must, in order to be effective as against her, be acknowledged by her before the officer after a private examination by him to ascertain that she executes it voluntarily and without compulsion from her husband, and the certificate of the officer must state that he so examined her, and that she acknowledged the instrument to be her free and voluntary act. In some of the other states, while a private examination is not necessary, the certificate must contain such a statement as to the free and voluntary nature of her act.<sup>356</sup> The officer is also usually required by the statute to ascertain, before taking the acknowledgment, that she understands the nature of the instrument.<sup>357</sup>

— Conclusiveness of certificate.

The certificate of acknowledgment is to be construed with reference to the instrument to which it is appended, and consequently omissions or errors therein, not pertaining to the fact of acknowledgment itself, may usually be corrected by

<sup>355</sup> 1 Stimson's Am. St. Law, §§ 1578-1582.

<sup>356</sup> 1 Stimson's Am. St. Law, § 6501.

<sup>357</sup> See *Norton v. Davis*, 83 Tex. 32; *Drew v. Arnold*, 85 Mo. 128; *Tavener v. Barrett*, 21 W. Va. 656; *Spencer v. Reese*, 165 Pa. St. 158; *Mettler v. Miller*, 129 Ill. 630.



reference to the language of the conveyance.<sup>358</sup> Oral evidence, however, is not admissible in order to prove that an essential fact was by mistake omitted from the certificate.<sup>359</sup> In some states, by statute, the certificate is merely *prima facie* evidence of the facts which it recites, and its falsity may be shown by extraneous evidence.<sup>360</sup> But, in the absence of a statutory provision to the contrary, a certificate of acknowledgment is usually regarded as conclusive in regard to the matters as to which the officer is required to certify,<sup>361</sup> though the fact that there was no acknowledgment whatever may be shown in contradiction of the certificate.<sup>362</sup> As between the parties, moreover, evidence is always admissible to show that the acknowledgment was obtained by fraud or imposition,

<sup>358</sup> *Carpenter v. Dexter*, 8 Wall. (U. S.) 513; *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618; *Summer v. Mitchell*, 29 Fla. 179; *Kelly v. Rosenstock*, 45 Md. 389; *Milner v. Nelson*, 86 Iowa, 452; *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58; *Fuhrman v. London*, 13 Serg. & R. (Pa.) 386, 15 Am. Dec. 608.

<sup>359</sup> *Elliott v. Piersol's Lessee*, 1 Pet. (U. S.) 328; *Ennor v. Thompson*, 46 Ill. 214; *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79; *Willis v. Gattman*, 53 Miss. 721; *Wynne v. Small*, 102 N. C. 133; *Harty v. Ladd*, 3 Or. 353.

<sup>360</sup> *Tuten v. Gazan*, 18 Fla. 751; *Romer v. Conter*, 53 Minn. 171; *Moore v. Hopkins*, 83 Cal. 270, 17 Am. St. Rep. 248; *Pierce v. Georger*, 103 Mo. 540.

<sup>361</sup> *Pickens v. Knisely*, 29 W. Va. 1; *Petty v. Grisard*, 45 Ark. 117; *Graham v. Anderson*, 42 Ill. 515, 92 Am. Dec. 89; *Pereau v. Frederick*, 17 Neb. 117; *Heilman v. Kroh*, 155 Pa. St. 1; *Mutual Life Ins. Co. of New York v. Corey*, 135 N. Y. 326; *Grider v. American Freehold Land Mortg. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58; *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156; *Johnston v. Wallace*, 53 Miss. 333, 24 Am. Rep. 699.

<sup>362</sup> *Meyer v. Gossett*, 38 Ark. 377; *Williamson v. Carskadden*, 36 Ohio St. 664; *Smith v. Ward*, 2 Root (Conn.) 374, 1 Am. Dec. 80; *Morris v. Sargent*, 18 Iowa, 90; *Grider v. American Freehold Land Mortg. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58; *O'Neil v. Webster*, 150 Mass. 572; *Michener v. Cavender*, 38 Pa. St. 334, 80 Am. Dec. 486; *Wheelock v. Cavitt*, 91 Tex. 679, 66 Am. St. Rep. 920,

in which the grantee participated, or of which he knew,<sup>363</sup> but this cannot be shown as against a person ignorant of the fraud.<sup>364</sup>

— Proof in place of acknowledgment.

In many states the statute provides for the proof of the deed by third persons before an official in case the acknowledgment is omitted, as when the grantor refuses to make it, or dies before making it; and likewise, in some states at least, when the acknowledgment or certificate is defective. In those states in which attesting witnesses are required, they are the proper persons to prove the instrument.<sup>365</sup>

§ 406. Delivery.

Delivery is the grantor's expression, by either word or act, of his intention that the conveyance shall take effect as a transfer of title. Until delivery, a conveyance is inoperative to transfer title, and consequently, even though the instrument is properly signed and sealed, no person can claim any rights thereunder.<sup>366</sup> It is immaterial that the person

<sup>363</sup> Grider v. American Freehold Land Mortg. Co., 99 Ala. 281, 42 Am. St. Rep. 58; Central Bank of Frederick v. Copeland, 18 Md. 305, 81 Am. Dec. 597; Allen v. Lenoir, 53 Miss. 321; Eyster v. Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Chivington v. Colorado Springs Co., 9 Colo. 597; Cover v. Manaway, 115 Pa. St. 338, 2 Am. St. Rep. 552.

<sup>364</sup> Ladew v. Paine, 82 Ill. 221; De Arnaz v. Escandon, 59 Cal. 486; Johnston v. Wallace, 53 Miss. 331, 24 Am. Rep. 699; Moore v. Fuller, 6 Or. 272, 25 Am. Rep. 524; Loudon v. Blythe, 27 Pa. St. 22, 67 Am. Dec. 442; Pierce v. Fort, 60 Tex. 464.

<sup>365</sup> 1 Stimson's Am. St. Law, §§ 1590-1606.

<sup>366</sup> Sheppard's Touchstone, 57; Co. Litt. 36a; 2 Bl. Comm. 307; 4 Kent's Comm. 454.

That acts without words are sufficient, see *Merrills v. Swift*, 18 Conn. 257, 3 Gray's Cas. 677; *Hill v. McNichol*, 80 Me. 209; *Bogie v. Bogie*, 35 Wis. 659; *Dukes v. Spangler*, 35 Ohio St. 119; *Fain v. Smith*, 14 Or. 82, 58 Am. Rep. 281; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326.

claiming thereunder is without knowledge of its nondelivery, and has reason to believe that it has been delivered, as when the conveyance has been handed him by one who fraudulently procured it from the grantor's custody,<sup>367</sup> or when the conveyance has been recorded.<sup>368</sup> The question whether certain acts or words constitute a delivery is one of intention, and there is a sufficient delivery if an intention that the conveyance shall immediately become operative clearly appears.<sup>369</sup> This question of intention is usually one of fact, which, in the absence of conclusive evidence upon the subject, is for the jury.<sup>370</sup>

There is considerable confusion in the decisions as to what may constitute a delivery,—a confusion which arises in some cases from a mistaken impression that the “delivery” of a deed refers to the physical disposition of the instrument itself. On the contrary, the delivery does not necessarily involve any manual transfer of the instrument;<sup>371</sup> and provided there is, as stated above, the intention that the deed shall take effect, the fact that the grantor retains possession of the instrument does not affect the validity of the delivery.<sup>372</sup> So, while it is frequently said, both by the older and

<sup>367</sup> *Van Amringe v. Morton*, 4 Whart. (Pa.) 382.

<sup>368</sup> See cases cited post, note 380.

<sup>369</sup> *Xenos v. Wickham*, 13 C. B. (N. S.) 381, per Willes, J.; *Hannah v. Swarnet*, 8 Watts (Pa.) 11, per Gibson, C. J.; *Fisher v. Hall*, 41 N. Y. 416, 3 Gray's Cas. 728; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377, 3 Gray's Cas. 691; *Burkholder v. Casad*, 47 Ind. 418; *Steel v. Miller*, 40 Iowa, 402.

<sup>370</sup> *Murray v. Stair*, 2 Barn. & C. 82; *Jones v. Swayze*, 42 N. J. Law, 279, 3 Gray's Cas. 732; *Brann v. Monroe*, 11 Ky. Law Rep. 324; *Crain v. Wright*, 36 Hun, 74, 114 N. Y. 307; *Fisher v. Kean*, 1 Watts (Pa.) 278; *Dwinell v. Bliss*, 58 Vt. 353; *Hurlburt v. Wheeler*, 40 N. H. 73.

<sup>371</sup> *Shelton's Case*, Cro. Eliz. 7; *Walker v. Walker*, 42 Ill. 311, 89 Am. Dec. 445; *Newton v. Bealer*, 41 Iowa, 334; *Byers v. McClanahan*, 6 Gill & J. (Md.) 250; *Conlan v. Grace*, 36 Minn. 276; *Farrar v. Bridges*, 5 Humph. (Tenn.) 411.

<sup>372</sup> *Doe d. Garnons v. Knight*, 5 Barn. & C. 671, 3 Gray's Cas. 646;

the later authorities, that the delivery may be made to a third person for the benefit of the grantee,<sup>373</sup> in such case, no doubt, the legal delivery results from the fact that an intention that the instrument shall take effect is thereby shown, and not from any particular virtue in the manual transfer. A declaration to such third person of an intention that the deed shall take effect would seem to be quite as effective as a manual transfer to him, if it can be satisfactorily proven.<sup>374</sup> On the other hand, a manual transfer of the deed to a third person without any expression, by word or act, of an intention to make it operative, does not constitute a delivery;<sup>375</sup> nor does such a transfer to the grantee himself, if the trans-

Xenos v. Wickham, L. R. 2 H. L. 296; Moore v. Hazelton, 9 Allen (Mass.) 102, 3 Gray's Cas. 706; Blight v. Schenck, 10 Pa. St. 285, 3 Gray's Cas. 684; Mitchell's Lessee v. Ryan, 3 Ohio St. 377, 3 Gray's Cas. 691; Colee v. Colee, 122 Ind. 109, 17 Am. St. Rep. 345; Stevens v. Hatch, 6 Minn. 64 (Gil. 19); Scrugham v. Wood, 15 Wend. (N. Y.) 545, 30 Am. Dec. 75; Austin v. Fendall, 2 MacArthur (D. C.) 362; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; Ledgerwood v. Gault, 2 Lea (Tenn.) 643; Otis v. Spencer, 102 Ill. 622, 40 Am. Rep. 617; Ruckman v. Ruckman, 32 N. J. Eq. 259; 4 Kent's Comm. 455.

<sup>373</sup> Sheppard's Touchstone, 57; 4 Kent's Comm. 455; Doe d. Garbons v. Knight, 5 Barn. & C. 671, 3 Gray's Cas. 646; Xenos v. Wickham, L. R. 2 H. L. 312; Jones v. Swayze, 42 N. J. Law, 279, 3 Gray's Cas. 732; Colyer v. Hyden, 94 Ky. 180; Tate v. Tate, 21 N. C. 22; Sneathen v. Sneathen, 104 Mo. 201, 24 Am. St. Rep. 326; Miller v. Meers, 155 Ill. 284; Finch's Cas. 1085; Eckman v. Eckman, 55 Pa. St. 269; Foster v. Mansfield, 3 Metc. (Mass.) 412, 3 Gray's Cas. 675; Blight v. Schenck, 10 Pa. St. 285, 3 Gray's Cas. 684; Church v. Gilman, 15 Wend. (N. Y.) 656.

<sup>374</sup> Kane v. Mackin, 9 Smedes & M. (Miss.) 387; Linton v. Brown's Adm'rs (C. C.) 20 Fed. 455; Diehl v. Emig, 65 Pa. St. 320; Vought's Ex'rs v. Vought, 50 N. J. Eq. 177; Rushin v. Shields, 11 Ga. 636, 56 Am. Dec. 436; Moore v. Hazelton, 9 Allen (Mass.) 102; Regan v. Howe, 121 Mass. 424. Contra, Moore v. Collins, 15 N. C. 384.

<sup>375</sup> Sheppard's Touchstone, 57; Mitchell's Lessee v. Ryan, 3 Ohio St. 377, 3 Gray's Cas. 691; Jackson v. Phipps, 12 Johns. (N. Y.) 418, 3 Gray's Cas. 671; Merrills v. Swift, 18 Conn. 257, 3 Gray's Cas. 677.

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fer is not with such an intention, but is for another purpose.<sup>376</sup>

The fact that the grantor reserves the right to revoke the conveyance or to resume control of the instrument shows conclusively that there is no delivery, since it negatives an intention that title shall immediately vest in the grantee.<sup>377</sup>

The fact that the grantor has the instrument recorded, while it is usually regarded as raising a presumption of delivery,<sup>378</sup> and, if accompanied by an intent to thereby make the instrument immediately operative, constitutes delivery,<sup>379</sup> is not a delivery if there is no such intent.<sup>380</sup> Upon

<sup>376</sup> *Bovee v. Hinde*, 135 Ill. 137; *Braman v. Bingham*, 26 N. Y. 483; *Dwinell v. Bliss*, 58 Vt. 353. See *Merrills v. Swift*, 18 Conn. 257, 6 Gray's Cas. 677.

<sup>377</sup> *Cook v. Brown*, 34 N. H. 460, 3 Gray's Cas. 709; *Doe d. Garnons v. Knight*, 5 Barn. & C. 671, 3 Gray's Cas. 711; *Fisher v. Hall*, 41 N. Y. 416, 3 Gray's Cas. 728; *Maynard v. Maynard*, 10 Mass. 456, 3 Gray's Cas. 669; *Taft v. Taft*, 59 Mich. 185; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326; *Rutledge v. Montgomery*, 30 Ga. 899; *Church v. Gilman*, 15 Wend. (N. Y.) 656; *Critchfield v. Critchfield*, 24 Pa. St. 100; *Lang v. Smith*, 37 W. Va. 725; *Duer v. James*, 42 Md. 492; *Berry v. Anderson*, 22 Ind. 36; *Huey v. Huey*, 65 Mo. 689.

This does not refer to the control of the paper itself, though the language of some of the cases might give that impression. It refers to the control of the operation of the instrument.

<sup>378</sup> *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210; *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82; *Rushin v. Shields*, 11 Ga. 636, 56 Am. Dec. 436; *Reed v. Douthit*, 62 Ill. 348; *Pool v. Davis*, 135 Ind. 323; *McGee v. Allison*, 94 Iowa, 527; *Den d. Farlee v. Farlee*, 21 N. J. Law, 279; *Rhine v. Robinson*, 27 Pa. St. 30; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377, 3 Gray's Cas. 691; *Blight v. Schenck*, 10 Pa. St. 285, 3 Gray's Cas. 685; *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510; *Laughlin v. Calumet & Chicago Canal & Dock Co.*, 13 C. C. A. 1, 65 Fed. 441; *Heil v. Redden*, 45 Kan. 562; *Patrick v. Howard*, 47 Mich. 40; *McDaniel v. Anderson*, 19 S. C. 211; *Estes v. German Nat. Bank*, 62 Ark. 7; *Lay v. Lay* (Ky.) 66 S. W. 371. *Contra*, *Hill v. McNichol*, 80 Me. 209.

<sup>379</sup> *Kerr v. Birnie*, 25 Ark. 225; *Issitt v. Dewey*, 47 Neb. 196; *Snider v. Lackenour*, 35 N. C. 360; *Fenton v. Miller*, 94 Mich. 204; *Boody v.*



the question whether the signing, sealing, and acknowledgment of a conveyance raise a presumption of delivery, the cases appear to be in conflict;<sup>381</sup> and the same may be said of the effect of the statement in the attestation clause that the conveyance has been delivered.<sup>382</sup> The fact that the parties treat the land as belonging to the grantee has also been regarded as tending to show a delivery.<sup>383</sup>

— Delivery in escrow.

A conveyance may be delivered to a person as an escrow, *i. e.*, a scroll or writing, to be held by him until the performance of a condition by the grantee. Upon the per-

Davis, 20 N. H. 140, 51 Am. Dec. 210. But in Massachusetts the leaving of a deed with the recording officer, without any other act, or any words indicating an intention that this shall constitute a delivery, was held not to be a delivery (*Barnes v. Barnes*, 161 Mass. 381), a manual delivery to such officer thus standing on the same plane as a manual delivery to any third person, without any indication of a purpose that the deed shall take effect. A statute in this state now provides that the record of a conveyance shall be equivalent to a delivery thereof in favor of any bona fide purchaser. Rev. Laws, c. 127, § 5.

<sup>380</sup> *Derry Bank v. Webster*, 44 N. H. 264, 3 Gray's Cas. 723; *Maynard v. Maynard*, 10 Mass. 456, 3 Gray's Cas. 669; *Jackson v. Phipps*, 12 Johns. (N. Y.) 418, 3 Gray's Cas. 671; *Davis v. Davis*, 92 Iowa, 147; *Hutton v. Smith*, 88 Iowa, 238; *Jones v. Bush*, 4 Har. (Del.) 1; *Hayes v. Davis*, 18 N. H. 600; *Hendricks v. Rasson*, 53 Mich. 575; *Thompson v. Jones*, 1 Head (Tenn.) 574; *Boardman v. Dean*, 34 Pa. St. 252; *Bullitt v. Taylor*, 34 Miss. 708, 69 Am. Dec. 412.

<sup>381</sup> That there is a presumption of delivery in such case, see *Kille v. Ege*, 79 Pa. St. 15; *Diehl v. Emig*, 65 Pa. St. 320; *Brann v. Monroe*, 11 Ky. Law Rep. 324. Contra, *Boyd v. Slayback*, 63 Cal. 493, 3 Gray's Cas. 735; *Alexander v. De Kermel*, 81 Ky. 345.

<sup>382</sup> That the statement in the attestation clause reciting delivery is insufficient, see *Fisher v. Hall*, 41 N. Y. 416, 3 Gray's Cas. 728; *Rushin v. Shield*, 11 Ga. 636. Contra, *Moore v. Hazelton*, 9 Allen (Mass.) 102, 3 Gray's Cas. 706; *Currie v. Donald*, 2 Wash. (Va.) 58.

<sup>383</sup> *Gould v. Day*, 94 U. S. 405; *Corley v. Corley*, 2 Cold. (Tenn.) 520; *Williams v. Williams*, 148 Ill. 426.

formance of such condition, even though it be after the death of the grantor, or after he has become mentally disabled, the instrument takes effect as of the time of the original delivery.<sup>384</sup> Strictly speaking, also, the instrument, it would seem, should date back to the original delivery as against the claims of intervening purchasers and creditors;<sup>385</sup> but in a number of cases in this country the courts, influenced, perhaps, by the tendency to require all rights to appear of record as against subsequent creditors, have held that an intervening creditor takes precedence of the rights of the grantee.<sup>386</sup>

An escrow is, it has been held, utterly invalid to transfer any rights until the performance of the condition, so that, if the person with whom it is deposited wrongfully yields possession thereof to the grantee, it cannot transfer any title, even though the claimant thereunder be an innocent purchaser for value.<sup>387</sup> There are, however, several decisions

<sup>384</sup> Sheppard's Touchstone, 58, 59; Hall v. Harris, 40 N. C. 303, 3 Gray's Cas. 681; Foster v. Mansfield, 3 Metc. (Mass.) 412, 3 Gray's Cas. 675; Ruggles v. Lawson, 13 Johns. (N. Y.) 285, 3 Gray's Cas. 673; Price v. Pittsburgh, Ft. W. & C. R. Co., 34 Ill. 13; Davis v. Clark, 58 Kan. 100; Webster v. Kings County Trust Co., 145 N. Y. 275.

<sup>385</sup> Sheppard's Touchstone, 59; 4 Kent's Comm. 454; Hall v. Harris, 40 N. C. 303, 3 Gray's Cas. 681; Shirley's Lessee v. Ayres, 14 Ohio, 307. See Whitfield v. Harris, 48 Miss. 710; Price v. Pittsburgh, Ft. W. & C. R. Co., 34 Ill. 13.

<sup>386</sup> Jackson v. Rowland, 6 Wend. (N. Y.) 666; Prutsman v. Baker, 30 Wis. 649, 11 Am. Rep. 592; Taft v. Taft, 59 Mich. 195, 60 Am. Rep. 291.

<sup>387</sup> Sheppard's Touchstone, 59; Smith v. South Royalton Bank, 32 Vt. 341, 3 Gray's Cas. 698; Hinman v. Booth, 21 Wend. (N. Y.) 267, 3 Gray's Cas. 698; Calhoun County v. American Emigrant Co., 93 U. S. 127; Heney v. Pesoli, 109 Cal. 53; Taft v. Taft, 59 Mich. 195, 60 Am. Rep. 291; Smith v. South Royalton Bank, 32 Vt. 341, 3 Gray's Cas. 698, 76 Am. Dec. 179; Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Jackson v. Rowley, 88 Iowa, 184; Ober v. Pendleton, 30 (932)

to the effect that an innocent purchaser from one in possession of the land cannot be affected by the fact that the conveyance to his grantor was an escrow, and this view seems most in conformity to right and justice, and the policy of the recording laws.<sup>388</sup>

A distinction is taken, in some of the cases, between an escrow, or writing not to take effect until the performance of a condition, and an instrument which is committed to a third person, with directions that it be delivered to the grantee on the happening of some event in the future, in which case, it is said, the deed takes effect immediately.<sup>389</sup> A conveyance is, so, quite frequently committed to a third person, with directions that it be delivered by him to the grantee upon the grantor's death.<sup>390</sup> The only possible distinction between an escrow and such a conveyance seems to be that the latter, if it passes out of the hands of the depositary named, is valid in favor at least of a *bona fide* holder. In some cases, however, it is denied that any distinction of this kind exists.<sup>391</sup>

Ark. 61; *Black v. Shreve*, 13 N. J. Eq. 458; *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314.

<sup>388</sup> *Blight v. Schenck*, 10 Pa. St. 285, 51 Am. Dec. 478, 3 Gray's Cas. 684; *Schurtz v. Colvin*, 55 Ohio St. 274; *Hubbard v. Greeley*, 84 Me. 340; *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49. And see *Haven v. Kramer*, 41 Iowa, 382.

<sup>389</sup> *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Gray's Cas. 663; *Bushell v. Pasmore*, 6 Mod. 217.

<sup>390</sup> *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 3 Gray's Cas. 675; *Cook v. Brown*, 34 N. H. 460, 3 Gray's Cas. 709; *Hatch v. Hatch*, 9 Mass. 307; *Hathaway v. Payne*, 34 N. Y. 106; *Prutsmann v. Baker*, 30 Wis. 649, 11 Am. Rep. 592; *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186; *Perkins*, 143, 144; 4 Kent's Comm. 455; *Baker v. Baker*, 159 Ill. 394; *Hoffmire v. Martin*, 29 Or. 240; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326.

<sup>391</sup> *State Bank at Trenton v. Evans*, 15 N. J. Law, 158, 28 Am. Dec. 400; *Johnson v. Baker*, 4 Barn. & Ald. 440, 3 Gray's Cas. 640. See *Stone v. Duvall*, 77 Ill. 475; *Millett v. Parker*, 2 Metc. (Ky.) 608, 613.

By the weight of authority, an instrument cannot be delivered to the grantee as an escrow,—that is, a manual delivery to the grantee, if it is to take effect as a legal delivery, must do so immediately, or not at all.<sup>392</sup> There are, however, a few cases adverse to this view.<sup>393</sup>

— **Effect of delivery.**

After the delivery of a conveyance, and the consequent passing of the title thereby, the fact that the grantee returns the written instrument to the grantor, or that it is canceled by agreement, does not have the effect of retransferring the title to the grantor, but for this a new conveyance is necessary.<sup>394</sup> But it has been held that, when the grantee cancels the conveyance, or delivers it up to the grantor to be canceled, with the intention of revesting the title, since he thereby loses all evidence of his title, the title may be regarded as always having remained in the grantor.<sup>395</sup>

<sup>392</sup> Co. Litt. 36a; Sheppard's Touchstone, 59; Whyddon's Case, 2 Cro. Eliz. 520, 3 Gray's Cas. 635; Braman v. Bingham, 26 N. Y. 483; Arnold v. Patrick, 6 Paige (N. Y.) 310, Finch's Cas. 1088; Richmond v. Morford, 4 Wash. 337; Ward v. Lewis, 4 Pick. (Mass.) 518; McCann v. Atherton, 106 Ill. 31; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Miller v. Fletcher, 27 Grat. (Va.) 403, 21 Am. Rep. 356, and cases cited; Campbell v. Jones, 52 Ark. 493; Gaston v. City of Portland, 16 Or. 255; Duncan v. Pope, 47 Ga. 445; Hubbard v. Greeley, 84 Me. 340.

The case, before referred to, of a transfer of possession of the instrument to the grantee otherwise than with an intent to pass title, is to be distinguished. See ante, note 376.

<sup>393</sup> Newlin v. Beard, 6 W. Va. 110; Lee v. Richmond, 90 Iowa, 695; Hudson v. Revett, 5 Bing. 368, 388. That it may be delivered in escrow to the grantee's agent, see Watkins v. Nash, L. R. 20 Eq. 262; Ashford v. Prewitt, 102 Ala. 264, 48 Am. St. Rep. 37.

<sup>394</sup> Ward v. Lumley, 5 Hurl. & N. 87; Strawn v. Norris, 21 Ark. 80; Gimon v. Davis, 36 Ala. 589; Alexander v. Hickox, 34 Mo. 496, 86 Am. Dec. 118; Jeffers v. Philo, 35 Ohio St. 173; Rifener v. Bowman, 53 Pa. St. 313; Wilke v. Wilke, 28 Wis. 296; Hatch v. Hatch, 9 Mass. 311, 6 Am. Dec. 67; Co. Litt. 225b, Butler's note.

<sup>395</sup> Farrar v. Farrar, 4 N. H. 191; Mussey v. Holt, 24 N. H. 248, (934)



## § 407. Acceptance.

At common law, a deed became effective by delivery, without any assent on the part of the grantee, though he could, after learning of the deed, refuse to accept it. In other words, an acceptance of the deed by the grantee, or even knowledge on his part of its execution, is unnecessary.<sup>396</sup> In some states in this country it has accordingly been held that a conveyance need not be accepted by the grantee, or, which is the same thing, its acceptance will be conclusively presumed, even as against third persons, until the grantee expresses his dissent.<sup>397</sup> In other states, however, it is de-

55 Am. Dec. 234; *Bank of New Bury v. Eastman*, 44 N. H. 431. See *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638. *Respass v. Jones*, 102 N. C. 5 (under local statute); *Holbrook v. Tirrell*, 9 Pick. (Mass.) 105; *Lawrence v. Stratton*, 6 Cush. (Mass.) 163. See, also, *Wallace v. Harnstad*, 44 Pa. St. 492.

<sup>396</sup> *Butler v. Baker*, 3 Coke, 26a; *Degory v. Roe*, 1 Leon. 152, 3 Gray's Cas. 634; *Thompson v. Leach*, 2 Vent. 198, 3 Gray's Cas. 639; *Xenos v. Wickham*, L. R. 2 H. L. 296. See *Skipwith's Ex'r v. Cunningham*, 8 Leigh (Va.) 272.

<sup>397</sup> *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377, 3 Gray's Cas. 691; *Skipwith's Ex'r v. Cunningham*, 8 Leigh (Va.) 272; *Guggenheimer v. Lockridge*, 39 W. Va. 461; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315, 3 Gray's Cas. 677; *Jones v. Swayze*, 42 N. J. Law, 279, 3 Gray's Cas. 732; *Schlicher v. Keeler*, 61 N. J. Eq. 394; *Moore v. Hazelton*, 9 Allen (Mass.) 102, 3 Gray's Cas. 706; *Myrover v. French*, 73 N. C. 609; *Regan v. Howe*, 121 Mass. 424 (semble); *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112; *Church v. Gilman*, 15 Wend. (N. Y.) 656; *Metcalf v. Brandon*, 60 Miss. 685 (semble); *Moore v. Giles*, 49 Conn. 570; *Wuester v. Folin*, 60 Kan. 334 (semble). So it has been held that knowledge by the grantee of the deed is not necessary. *Mather v. Corliss*, 103 Mass. 568; *Everett v. Everett*, 48 N. Y. 218; *Snow v. Inhabitants of Orleans*, 126 Mass. 453; *Elsberry v. Boykin*, 65 Ala. 336.

In the case of a conveyance in trust, "although the trustee may never have heard of the deed, the title vests in him, subject to a disclaimer on his part." *Adams v. Adams*, 21 Wall. (U. S.) 185; *Ames, Cas. Trusts* (2d Ed.) 227, and cases cited in notes.



cided that an acceptance by the grantee is necessary,<sup>398</sup> and occasionally it is said that, while an acceptance may be presumed in ordinary cases, this is not so if the conveyance is subject to a condition, or otherwise imposes an obligation upon the grantee.<sup>399</sup> Sometimes, when it is said that an acceptance will be presumed, it is difficult to determine whether this means that there is a conclusive presumption to this effect, or that there is a presumption which may be overthrown by evidence that the grantee had no knowledge of the instrument, or that he failed to indicate his acquiescence therein. The theory that an actual acceptance is necessary involves almost insuperable difficulties when the grantee is

<sup>398</sup> *Welch v. Sackett*, 12 Wis. 243, 3 Gray's Cas. 714; *Oxnard v. Blake*, 45 Me. 602; *Jackson v. Phipps*, 12 Johns. (N. Y.) 418, 3 Gray's Cas. 671; *Hulick v. Scovil*, 9 Ill. 159; *Cravens v. Rossiter*, 116 Mo. 338, 38 Am. St. Rep. 606; *Watson v. Hillman*, 57 Mich. 607; *Meigs v. Dexter*, 172 Mass. 217; *Stallings v. Newton*, 110 Ga. 875; *Alexander v. De Kermel*, 81 Ky. 345; *Knox v. Clark* (Colo. App.) 62 Pac. 334; *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726; *Kempner v. Rosenthal*, 81 Tex. 12; *Tuttle v. Turner*, 28 Tex. 759, *Finch's Cas.* 1088; *Day v. Griffith*, 15 Iowa, 104; *Wiggins v. Lusk*, 12 Ill. 132; *Moore v. Flynn*, 135 Ill. 74; *Bell v. Farmer's Bank of Kentucky*, 11 Bush (Ky.) 34, 21 Am. Rep. 205.

This view is apparently based, to a great extent, upon the theory that a conveyance is a contract, which it is not, though frequently it results from a contract. Title passes under a devise without the knowledge or consent of the devisee, and there seems no reason why it should not do so in the case of a conveyance *inter vivos*. There are difficulties in the application of the common-law rule, as is well shown in *Welch v. Sackett*, 12 Wis. 270, 3 Gray's Cas. 714, in case the grantee subsequently refuses to take the property, but the same is true in the case of an unaccepted devise. The fact that the rule requiring an acceptance breaks down utterly in the case of a conveyance to a person not *sui juris* is sufficient in itself to raise doubts as to its soundness when applied in other cases.

<sup>399</sup> *Derry Bank v. Webster*, 44 N. H. 264, 3 Gray's Cas. 723; *Jackson v. Bodle*, 20 Johns. (N. Y.) 184; *Elsberry v. Boykin*, 65 Ala. 336; *Johnson v. Farley*, 45 N. H. 505; *Hibberd v. Smith*, 67 Cal. 547. See *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377, 3 Gray's Cas. 691.

an infant or an insane person, and in such cases the courts invariably, it seems, presume an acceptance,<sup>400</sup> or, in other words, adopt the common-law rule.

The cases requiring the acceptance of a conveyance do not regard such acceptance as a part of the delivery, but hold that it may take place at any subsequent time, even after the death of the grantor, the title remaining, until such acceptance, in the latter, or, presumably, in his heirs or devisees.

### § 408. Execution by agent.

In discussing the subject of those proprietary rights known as "powers," reference was made, for the purpose of distinguishing them, to powers of agency, which are not proprietary rights enforceable against the whole world, but are merely rights of representation, usually based on a contract between the donor and donee of the power,—that is, the principal and the agent,—and which are of no effect as regards third persons until the agent acts under the power. Such a power of agency enters into the subject of the transfer of land by reason of the fact that the owner of land may transfer it, not only by himself executing the instrument of transfer, but also by empowering another to do so in his absence. Such a power or authority, given to another to transfer land, must, so far, at least, as the conveyance is required to be under seal, be itself under seal,<sup>401</sup> and it is, as are other

<sup>400</sup> *Davis v. Garrett*, 91 Tenn. 147; *Parker v. Salmons*, 101 Ga. 160; *Miller v. Meers*, 155 Ill. 284, *Finch's Cas.* 1085; *Winterbottom v. Patison* 152 Ill. 334; *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392; *Eastham v. Powell*, 51 Ark. 530; *Campbell v. Kuhn*, 45 Mich. 513, 40 Am. Rep. 479; *Bjmerland v. Eley*, 15 Wash. 101; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326.

<sup>401</sup> *Huffcut*, Agency (2d Ed.) 37; *Montgomery v. Dorion*, 6 N. H. 250; *Heath v. Nutter*, 50 Me. 378; *Cadell v. Allen*, 99 N. C. 542; *Shuetze v. Bailey*, 40 Mo. 69; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121. There are statutes to the same effect in many states. 1 *Stimson's Am. St. Law*, § 1670.

authorities under seal, usually known as a "power of attorney." Such an execution of a conveyance by an agent must be distinguished from the cases before referred to, in which the manual signing of the instrument by the hand of another is adopted by the grantor as his own act, this being for all purposes his own signature.

According to some decisions, the signature of a conveyance by an attorney or agent must be in the name of the principal, the form "A. by B." thus being correct, and "B. for A." being incorrect.<sup>402</sup> But by the more modern decisions this strictness of view is relaxed, and it is generally regarded as sufficient if it appears from either the signature or from the instrument as a whole that the instrument is the deed, not of the agent, but of the principal;<sup>403</sup> and in some states there is a statutory provision to this effect.<sup>404</sup> The fact that the name of the agent himself does not appear in the signature does not affect the validity of the execution.<sup>405</sup> A conveyance which fails at law, because its execution is by the agent in his own name, instead of in that of his principal, will be sustained in equity as an agreement to convey, and, as such, will be effective, not only between the parties, but as against subsequent purchasers with notice.<sup>406</sup>

<sup>402</sup> *Combe's Case*, 9 Coke, 75; 2 Kent's Comm. 631; *Fowler v. Shearer*, 7 Mass. 14; *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126; *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65; *Carter v. Chaudron*, 21 Ala. 72; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *Morrison v. Bowman*, 29 Cal. 337; *Clarke's Lessee v. Courtney*, 5 Pet. (U. S.) 318, 349; *Townsend v. Corning*, 23 Wend. (N. Y.) 442.

<sup>403</sup> *Shanks v. Lancaster*, 5 Grat. (Va.) 110, 50 Am. Dec. 108; *McClure v. Herring*, 70 Mo. 18; *Doe d. Tenant v. Roe*, 27 Ga. 418; *Hale v. Woods*, 10 N. H. 471; *Magill v. Hinsdale*, 6 Conn. 464a; *Rogers v. Bracken's Adm'r*, 15 Tex. 564; *Bigelow v. Livingston*, 28 Minn. 57; *Heffernan v. Addams*, 7 Watts (Pa.) 116.

<sup>404</sup> 1 Stimson's Am. St. Law, § 1675.

<sup>405</sup> *Forsyth v. Day*, 41 Me. 382; *Berkey v. Judd*, 22 Minn. 287; *Devinney v. Reynolds*, 1 Watts & S. (Pa.) 328.

<sup>406</sup> *Wilkinson v. Getty*, 13 Iowa, 157, 81 Am. Dec. 428; *Love v.* (938)

A married woman has power to transfer her rights in land only in the mode named by statute, and consequently, in the absence of express statutory authority, or a declaration that she may transfer her separate estate as if she were sole, she cannot execute the conveyance by an agent or attorney, and, if so executed, it will, as against her, be void both at law and in equity.<sup>407</sup>

Authority to an agent to execute a conveyance for one involves authority in him to acknowledge the instrument for any of the purposes for which an acknowledgment is necessary or proper.<sup>408</sup>

Sierra Nevada Lake Water & Min. Co., 32 Cal. 639, 91 Am. Dec. 602; Ramage v. Ramage, 27 S. C. 39; McCaleb v. Pradat, 25 Miss. 257. See Stark v. Starr, 94 U. S. 477.

<sup>407</sup> Wilkinson v. Getty, 13 Iowa, 157; Earle's Adm'rs v. Earle, 20 N. J. Law, 347; Dentzel v. Waldie, 30 Cal. 138; Holland v. Moon, 39 Ark. 120; Waddell v. Weaver's Adm'rs, 42 Ala. 293; Randall v. Kreiger, 23 Wall. (U. S.) 137; Mexia v. Oliver, 148 U. S. 664.

<sup>408</sup> Robinson v. Mauldin, 11 Ala. 977; Basshor v. Stewart, 54 Md. 376; Bigelow v. Livingston, 28 Minn. 57; Richmond v. Voorhees, 10 Wash. 316. But see Gosselin v. City of Chicago, 103 Ill. 623.

## CHAPTER XX.

### TRANSFER BY WILL.

- § 409. General considerations.
- 410. Signing by testator.
- 411. Acknowledgment and publication.
- 412. Competency of witnesses.
- 413. Attestation and subscription.
- 414. Holographic and nuncupative wills.
- 415. Undue influence.
- 416. Lapsed and void devises.
- 417. The revocation of a will.
- 418. Children or issue omitted from will.
- 419. Revival of will.
- 420. Republication.

Any interests in land may be transferred by will, but, apart from specific statutes to that effect, real property not owned by the testator at the time of making the will cannot pass thereunder. Statutes now exist in most, if not all, jurisdictions, allowing one to dispose of real property afterwards to be acquired by him.

Real property disposed of by will passes directly to the devisee, and not to the personal representative, except in a few states, where the statute otherwise provides.

A will must be in writing, signed by the testator, or, in some states, by another in his presence. The will must be attested by witnesses, before whom the testator must acknowledge the instrument or his signature thereto, as the statute may require. The witnesses must be persons competent to testify in regard to the will, and they are usually required to sign their names to the instrument in the testator's presence.

In case a devise fails, owing to the death of a devisee, before the death of the testator, the property included therein passes



by statute, in many states, to the child or issue of such devisee, In many of the states, in the absence of such a statute applicable to the case, the property will pass under a residuary devise.

A will may be revoked by the testator, in whole or in part, by its cancellation or destruction, or by a subsequent will expressly revoking it, or making a different disposition of part or all of the property. The will of a woman is, as a rule, revoked by her marriage, and of a man by his marriage and the birth of issue.

In some states, an earlier will is revived by the revocation of a later will which revoked the former will, and in some states this is the case when there is an intention to that effect. In others, a will once revoked cannot be revived otherwise than by the re-execution thereof.

A will may be republished by its re-execution, or the execution of a codicil.

#### § 409. General considerations.

While, before the Norman Conquest, and for a century thereafter, persons were allowed to make *post obit* gifts of land, to take effect in possession after the death of the donor, the rule was established by the king's court, late in the twelfth century, in favor of the heir, that a transfer of a freehold interest in land, though to take effect only after the death of the transferrer, must be by livery of seisin, and so any transfer of such an interest, answering to our modern will or devise, became impossible, except in the case of certain lands devisable by local custom.<sup>1</sup> Eventually the invention of uses enabled one to devise his land by making a feoffment to uses to be declared by his last will, in which case chancery would enforce the use so declared.<sup>2</sup> The power of thus

<sup>1</sup> 2 Pollock & Maitland, Hist. Eng. Law, 324-329.

<sup>2</sup> 1 Sanders, Uses & Trusts (5th Ed.) 64; Williams, Real Prop. (18th Ed.) 167. See ante, § 84.

making a will by the declaration of a use was, however, put an end to by the Statute of Uses, this being in fact one of the purposes of its passage, as recited in the preamble. But the inconvenience of this prohibition of testamentary disposition was so greatly felt that, five years later, the Statute of Wills<sup>3</sup> was passed, by which statute tenants in fee simple were empowered to dispose of all their lands held in socage tenure, and two-thirds of those held by knight service, and, after the change of all tenures into socage tenures,<sup>4</sup> all lands came within the operation of this statute, and were devisable.<sup>5</sup>

A will of real property was in early times, and likewise after the Statute of Wills, regarded as a species of conveyance, to take effect at a future time,—that is, on the death of the testator.<sup>6</sup> This theory had important results upon the law of wills of real property, as distinct from wills of personalty. One most important result of this theory was that, since one could convey only such land as he owned, a will could operate upon such real property only as the testator owned at the time of making the will.<sup>7</sup> And for this reason, if one aliened property covered by his will, and subsequently acquired it by a reconveyance, it did not pass under the will.<sup>8</sup>

This rule that after-acquired real property does not pass under a will has been changed by statute in most, if not all, jurisdictions. In England the Wills Act<sup>9</sup> provided that a

<sup>3</sup> 32 Hen. VIII. c. 1 (A. D. 1540).

<sup>4</sup> Ante, § 13.

<sup>5</sup> See Williams, Real Prop. (18th Ed.) 227; Digby, Hist. Real Prop. c. 8.

<sup>6</sup> 2 Pollock & Maitland, Hist. Eng. Law, 313; Williams, Real Prop. (18th Ed.) 232.

<sup>7</sup> Harwood v. Goodright, 1 Cowp. 87; Brydges v. Chandos, 2 Ves. Jr. 417, 427; Williams, Real Prop. (18th Ed.) 233.

<sup>8</sup> Post, § 417.

<sup>9</sup> 7 Wm. IV. and 1 Vict. c. 26, §§ 3, 24 (A. D. 1837).

testator might dispose of all real and personal estate to which he might be entitled at the time of his death, and that every will should, in the absence of indications of a contrary intention, be construed to take effect, with reference to the real and personal estate comprised in it, as if executed immediately before the death of testator. The effect of these provisions is that a gift in general terms, such as "all my real estate," or "all my property," or "all my land," passes after-acquired interests, unless a contrary intention appears, and that a "residuary devise"—that is, a devise of all one's property not otherwise disposed of—has the same effect.<sup>10</sup>

In some of the states there are statutes substantially similar to those in England,<sup>11</sup> and having a similar operation.<sup>12</sup> In other states the statute provides that after-acquired real property shall pass by the will only when it appears from the will that such was the testator's intention.<sup>13</sup>

Another effect of the theory that a devise was a conveyance was that a residuary devise was regarded as a specific devise of such land as the testator owned at the time of making the will, and did not otherwise dispose of therein,—a matter which will be considered hereafter more particularly in connection with "lapsed and void devises."<sup>14</sup>

A further result of this theory was that a devise of real property, unlike a legacy of personalty, was regarded as passing the land directly to the devisee, without the intervention of the executor or administrator. This rule still prevails

<sup>10</sup> 1 Jarman, Wills, 291, 612.

<sup>11</sup> 1 Stimson's Am. St. Law, §§ 2806, 2809.

<sup>12</sup> See *Webb v. Archibald*, 128 Mo. 299; *Jacobs' Estate*, 140 Pa. St. 268.

<sup>13</sup> 1 Stimson's Am. St. Law, § 2809 (C). See *Church v. Warren Mfg. Co.*, 14 R. I. 539; *Briggs v. Briggs*, 69 Iowa, 617; *Paine v. Forsaith*, 84 Me. 66; *Woman's Union Missionary Soc. of America v. Mead*, 131 Ill. 338; *Kimball v. Ellison*, 128 Mass. 41.

<sup>14</sup> See post, § 416.

in the majority of jurisdictions, though it has been changed by recent statutes in England and a few states.<sup>15</sup>

The king's courts, in the twelfth century, having established the principle that there could be no testamentary gift of land, relinquished the jurisdiction of the property of decedents to the ecclesiastical courts, and thereafter the law of succession to personal property, including chattels real, was developed by these latter courts.<sup>16</sup> As a result, the civil-law conception of a will, not as a conveyance, but as a secret and revocable instrument, which was to take effect at the death of testator only, has always been applied in the case of personality;<sup>17</sup> and likewise the position of an executor or administrator as the personal representative of the deceased, to whom all his personal property passes on his death, including that disposed of by will, became established at an early date.<sup>18</sup>

#### § 410. Signing by testator.

In all states the statute requires that a will shall be signed by the testator, or, in the majority of states, by some other person, by the testator's express direction, and in his presence.<sup>19</sup> The testator's own signature may be by means of a mark, even though he is able to write, provided the mark is intended as a signature;<sup>20</sup> and so, in signing, he may use

<sup>15</sup> 2 Woerner, Administration, § 337; 11 Am. & Eng. Enc. Law (2d Ed.) 1037 et seq.

<sup>16</sup> 2 Pollock & Maitland, Hist. Eng. Law, 329, 331.

<sup>17</sup> Holdsworth & Vickers, Law of Succession, 31; Maine, Anc. Law (4th Ed.) 173 et seq.; Harwood v. Goodright, Cowp. 87.

<sup>18</sup> 2 Pollock & Maitland, Hist. Eng. Law, 334, 345; Digby, Hist. Real Prop. (5th Ed.) 380.

<sup>19</sup> 1 Stimson's Am. St. Law, § 2640.

<sup>20</sup> Page, Wills, § 173; Nickerson v. Buck, 12 Cush. (Mass.) 332; Robinson v. Brewster, 140 Ill. 649, 33 Am. St. Rep. 265; Plate's Estate, 148 Pa. St. 55, 33 Am. St. Rep. 805; Bevelot v. Lestrade, 153 Ill. 625; Rook v. Wilson, 142 Ind. 24, 51 Am. St. Rep. 163.



only his initials, or his Christian name, or even adopt another name than his own.<sup>21</sup> When the signature is by a person other than the testator, the requirements that it be by his direction and in his presence must be strictly complied with,<sup>22</sup> and, apart from statute, one cannot thus sign by another.<sup>23</sup>

In regard to the position of the signature, the rules in the different states are not in accord. Under statutes which follow the English Statute of Frauds in merely requiring that the will be signed, it has been decided that the place of the signature, whether by the testator himself, or by another for him, is immaterial, and that it may be made in the margin, in the body of the will, or elsewhere. Accordingly, the writing of the testator's name in the body of the will, as when he commences it, "I, John B.," is sufficient, under such statutes, as a signature, provided, it seems, it is so intended, or at least another signature is not intended to be added.<sup>24</sup> By the modern English statutes, however, and by those of a number of the states, the testator must "subscribe" the will, or there is some other express requirement that the signature appear at the end of the will.<sup>25</sup> Under such statutes it is usually held that the will is void if the signature is followed

<sup>21</sup> *Knox's Estate*, 131 Pa. St. 220, *Chaplin, Wills*, 217; *In re Savory*, 15 Jur. 1042; 1 *Jarman, Wills*, 79.

<sup>22</sup> *Page, Wills*, §§ 175, 176; *Waite v. Frisbie*, 45 Minn. 361; *Murry v. Hennessey*, 48 Neb. 608; *Armstrong's Ex'r v. Armstrong's Heirs*, 29 Ala. 538; *Greenough v. Greenough*, 11 Pa. St. 489. See *Pool v. Buffum*, 3 Or. 438, 443.

<sup>23</sup> *In re McElwaine*, 18 N. J. Eq. 499; *Robins v. Coryell*, 27 Barb. (N. Y.) 559.

<sup>24</sup> *Lemayne v. Stanley*, 3 Lev. 1, 4 *Gray's Cas.* 188, *Chaplin, Wills*, 224; *Armstrong's Ex'r v. Armstrong's Heirs*, 29 Ala. 538, *Chaplin, Wills*, 224; *Miles' Will*, 4 Dana (Ky.) 1; *Adams v. Field*, 21 Vt. 256; *Catlett v. Catlett*, 55 Mo. 330. See *In re Booth*, 127 N. Y. 109, 24 Am. St. Rep. 429, *Chaplin, Wills*, 224.

<sup>25</sup> 1 *Jarman, Wills*, 81; 1 *Stimson's Am. St. Law*, § 2640.



by clauses, written before the execution and publication of the will, which undertake to dispose of property, or to appoint an executor or guardian, while it is not void if the signature is followed by mere explanatory notes or directions.<sup>26</sup> The signature may be either before or after the "attestation" clause,<sup>27</sup> the nature of which is explained in another section. If writing is added below the signature subsequently to the execution and publication of the will, it is merely an attempted codicil, not affecting the validity of the will as expressed in the writing before the signature.<sup>28</sup>

### § 411. Acknowledgment and publication.

The statute sometimes requires testator's signature to be acknowledged by him before witnesses, usually as an alternative to his actual signature of the will in their presence.<sup>29</sup> No particular words of acknowledgment are necessary, it being sufficient that he indicates to the witnesses, either by words or acts, that he regards the signature, which is visible to them, as his act.<sup>30</sup>

There is also, in some states, a requirement that the testator acknowledge, in the presence of witnesses, that the instrument is his last will and testament, this constituting what is known as the "publication" of the will.<sup>31</sup> The publica-

<sup>26</sup> *Sisters of Charity of St. Vincent de Paul v. Kelly*, 67 N. Y. 409; *In re Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616; *Wineland's Appeal*, 118 Pa. St. 37; *Bigelow, Wills*, 46.

<sup>27</sup> *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156; *Hallowell v. Hallowell*, 88 Ind. 251; *Page, Wills*, § 183.

<sup>28</sup> *In re Jacobson*, 6 Dem. Sur. (N. Y.) 298, *Chaplin, Wills*, 229.

<sup>29</sup> 1 *Stimson's Am. St. Law*, § 2642. See *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Sisters of Charity of St. Vincent de Paul v. Kelly*, 67 N. Y. 409.

<sup>30</sup> *Page, Wills*, § 205; *Allison v. Allison*, 46 Ill. 61; *Turner v. Cook*, 36 Ind. 129; *Smith v. Holden*, 58 Kan. 535; *In re Laudy*, 148 N. Y. 403.

<sup>31</sup> 1 *Stimson's Am. St. Law*, § 2642; *Bigelow, Wills*, 47.

tion, however, like the acknowledgment of the signature, need not be by express declaration, the testator's mere assent to a statement by another, or incidental reference to the instrument as his will, being sufficient, if it plainly informs the witnesses that the instrument is his will.<sup>32</sup> In the absence of a statutory requirement, it is, by the weight of authority, unnecessary that the testator inform the witnesses that the instrument is his will.<sup>33</sup>

### § 412. Competency of witnesses.

The state statutes, with few, if any, exceptions, require the signature, or acknowledgment thereof, to be in the presence of two and sometimes three witnesses,<sup>34</sup> and also, as just stated, publication of the will as such in the presence of witnesses is frequently required. If there be less than the statutory number of competent witnesses, the will is void.<sup>35</sup> The statute usually requires the witness to be "competent" or "credible,"<sup>36</sup> and the term "credible" is construed as meaning the same as "competent."<sup>37</sup> It is sufficient that the competency exists at the date of the will; and the fact that the witness subsequently becomes incompetent

<sup>32</sup> *Gilbert v. Knox*, 52 N. Y. 125; *Grimm v. Tittman*, 113 Mo. 56; *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Hildreth v. Marshall*, 51 N. J. Eq. 241.

<sup>33</sup> *White v. Trustees of British Museum*, 6 Bing. 310, 4 Gray's Cas. 250; *Moodie v. Reid*, 7 Taunt. 355; *Barnewall v. Murrell*, 108 Ala. 366; *Dickie v. Carter*, 42 Ill. 376; *Turner v. Cook*, 36 Ind. 129; *Osborn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155; *Watson v. Pipes*, 32 Miss. 451; *Canada's Appeal from Probate*, 47 Conn. 450; *In re Hulse's Will*, 52 Iowa, 662.

<sup>34</sup> 1 *Stimson's Am. St. Law*, § 2644.

<sup>35</sup> See *Cureton v. Taylor*, 89 Ga. 490; *Poore v. Poore*, 55 Kan. 687; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875.

<sup>36</sup> 1 *Stimson's Am. St. Law*, § 2646.

<sup>37</sup> *Page, Wills*, § 191; *Amory v. Fellowes*, 5 Mass. 219; *Combs' Appeal*, 105 Pa. St. 158; *In re Noble's Will*, 124 Ill. 266; *Brown v. Pridgen*, 56 Tex. 124.

to testify does not invalidate the will, though it may necessitate that the will be proven by secondary evidence.<sup>38</sup> In other words, the statutory requirement as to the witnesses necessary to attest the execution of a will is entirely distinct from the question as to how the will shall be proved after the testator's death, though such proof is by means of the attesting witnesses, if they are then competent to testify, and are accessible.<sup>39</sup>

The competency of an attesting witness is, as a general rule, determined by the consideration whether the witness is a person competent to testify in a court of justice in regard to the will, and questions have frequently arisen as to the competency of particular persons at common law, and under modern statutory provisions. At common law, a beneficiary under the will was not a competent witness, because, by the rules prevailing in courts of justice, one interested in litigation could not testify therein.<sup>40</sup> Since this rule had the effect of frequently invalidating a will merely because a witness had a small interest thereunder, an act was passed providing that the testamentary provision in favor of the witness should be void, and that he should be regarded as a competent witness.<sup>41</sup> In this country there are statutes of a more or less similar character in most of the states, it being

<sup>38</sup> *Brograve v. Winder*, 2 Ves. Jr. 636; *Sears v. Dillingham*, 12 Mass. 358, 4 Gray's Cas. 236; *Stewart v. Harriman*, 56 N. H. 25; *In re Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121; *Fisher v. Spence*, 150 Ill. 253; *Warren v. Baxter*, 48 Me. 193; *Hopf v. State*, 72 Tex. 281. The statute so provides in a number of states. 1 *Stimson's Am. St. Law*, § 2647.

<sup>39</sup> *Cheatham v. Hatcher*, 30 Grat. (Va.) 56, 32 Am. Rep. 650; *Trustees of Theological Seminary of Auburn v. Calhoun*, 25 N. Y. 422; *Carlton v. Carlton*, 40 N. H. 14.

<sup>40</sup> 1 *Jarman, Wills*, 69; *Holdfast v. Dowsing*, 2 *Strange*, 1253, 4 Gray's Cas. 231.

<sup>41</sup> 25 Geo. II. c. 6; 7 Wm. IV. and 1 Vict. c. 26, § 14.

usually declared, as in England, that the devise or bequest to the witness shall be void, but frequently with a provision giving such witness what he would have taken, in the absence of the will, by descent or distribution, to the extent that this does not exceed the devise or bequest.<sup>42</sup> A mere charge upon land in favor of a witness for the payment of debts due him will not, however, in most states, affect his competency.<sup>43</sup> And the statute also, in effect, frequently provides that the witness shall not lose the benefit of such a provision if there are enough witnesses without him.<sup>44</sup>

At common law, a husband or wife is incompetent as a witness in regard to any matter in which the other has a pecuniary interest, and accordingly, in the absence of a statute to the contrary, a husband or wife of a devisee or a legatee is not a competent witness to the will.<sup>45</sup> The modern statutes, however, removing the disability of the husband and wife of a party in interest to testify, have in some states been construed as removing the incompetency as an attesting witness to a will.<sup>46</sup> A statute invalidating a provision in favor of a witness in order to render the witness competent has occasionally been construed to apply to a provision in favor of the husband of a witness.<sup>47</sup> Such a statute has not, however, usually been given such a construction.<sup>48</sup> In a

<sup>42</sup> 1 Stimson's Am. St. Law, §§ 2650, 2651.

<sup>43</sup> 1 Stimson's Am. St. Law, § 2648.

<sup>44</sup> 1 Stimson's Am. St. Law, § 2650; 1 Woerner, Administration, § 41.

<sup>45</sup> *Windham v. Chetwynd*, 1 Burrows, 414, 424; *Fisher v. Spence*, 150 Ill. 253; *Sullivan v. Sullivan*, 106 Mass. 474, 4 Gray's Cas. 243; *Winslow v. Kimball*, 25 Me. 493, 4 Gray's Cas. 239; *Rucker v. Lambdin*, 12 Smedes & M. (Miss.) 230; *Hodgman v. Kittredge*, 67 N. H. 254; *Giddings v. Turgeon*, 58 Vt. 106.

<sup>46</sup> *In re Holt's Will*, 56 Minn. 33; *Lippincott v. Wikoff*, 54 N. J. Eq. 107; *Hawkins v. Hawkins*, 54 Iowa, 443, Chaplin, Wills, 304.

<sup>47</sup> *Winslow v. Kimball*, 25 Me. 493, 4 Gray's Cas. 239; *Jackson v. Durland*, 2 Johns. Cas. (N. Y.) 314.

<sup>48</sup> *Sullivan v. Sullivan*, 106 Mass. 474, 4 Gray's Cas. 243, Chaplin,



number of states a devise or legacy to the husband or wife of a subscribing witness is expressly made void by the statute.<sup>49</sup>

§ 413. **Attestation and subscription.**

The witnesses as to the execution or publication of a will are required, usually, not only to witness the performance of these acts by testator, but also to sign their names upon the instrument "in the presence of" testator, and sometimes "in the presence of" each other.<sup>50</sup> The question of what constitutes "presence," within this requirement, has been the subject of numerous decisions, of a somewhat conflicting character. The testator and the witnesses need not, it has been held, be in the same room, in order to render the signatures of the latter "in the presence of" the former, it being sufficient that he sees them, as through a door or window;<sup>51</sup> and though the testator does not actually see the witnesses sign, this is usually regarded as taking place in his presence, if he is physically able, by shifting his gaze, to see the act of signing, provided he can do this without pain or danger to life.<sup>52</sup> He must know what the witnesses are doing,<sup>53</sup> and the signing is not in his presence if he is in such a state mentally as not to have such knowledge.<sup>54</sup> When

Wills, 299; *Fisher v. Spence*, 150 Ill. 253; *Hodgman v. Kittredge*, 67 N. H. 254; *Giddings v. Turgeon*, 58 Vt. 106. See *In re Holt's Will*, 56 Minn. 33.

<sup>49</sup> 1 Stimson's Am. St. Law, § 2650.

<sup>50</sup> 1 Stimson's Am. St. Law, § 2644.

<sup>51</sup> *Shires v. Glascock*, 2 Salk. 688, 4 Gray's Cas. 247; *Casson v. Dade*, 1 Brown Ch. 99, 4 Gray's Cas. 250; *Ambre v. Weishaar*, 74 Ill. 109; *Riggs v. Riggs*, 135 Mass. 238.

<sup>52</sup> *Page*, Wills, §§ 210-212; 1 *Jarman*, Wills, 89 et seq.; *Bigelow*, Wills, 55. See *Hamlin v. Fletcher*, 64 Ga. 549; *Maynard v. Vinton*, 59 Mich. 139; *Watson v. Pipes*, 32 Miss. 451; *Drury v. Connell*, 177 Ill. 43; *Riggs v. Riggs*, 135 Mass. 238.

<sup>53</sup> 1 *Jarman*, Wills, 89; *Watson v. Pipes*, 32 Miss. 451.

<sup>54</sup> *Right v. Price*, 1 Doug. 241; *Chappell v. Trent*, 90 Va. 849.



the will is signed in the room in which testator is, there is, it seems, a presumption that the requirement is satisfied.<sup>55</sup>

**§ 414. Holographic and nuncupative wills.**

By statute in a number of states, "holographic" wills—that is, wills entirely written by testator himself—are valid, though not executed in accordance with the ordinary statutory requirements, if signed by him, and if, in two states at least, found among the valuable papers and effects of deceased.<sup>56</sup>

"Nuncupative" wills—that is, wills consisting of merely oral declarations by testator in the presence of witnesses—were allowed before the passage of the Statute of Frauds, but by that statute the right to make them was greatly restricted, the amount of property which could be so disposed of being greatly limited, and it also being provided that they could be made only in the last sickness of deceased, before three witnesses, and usually in his own habitation. In this country there are usually statutory provisions of a somewhat similar character, providing especially, however, for the making of such wills by soldiers in actual military service, and by mariners at sea. The law of nuncupative wills never applied in England to real property, in the absence of a local custom to the contrary, since, before the Statute of Wills, such property could not be devised, and since, by the terms of that statute, as well as by the Statute of Frauds, a will of lands was required to be "in writing." The statutes on the subject in this country usually restrict such wills to "real property."<sup>57</sup>

<sup>55</sup> *Neil v. Neil*, 1 Leigh (Va.) 6; *Stewart v. Stewart*, 56 N. J. Eq. 761; *Watson v. Pipes*, 32 Miss. 451.

<sup>56</sup> 1 Stimson's Am. St. Law, § 2645. See Page, Wills, §§ 229-231.

<sup>57</sup> Bigelow, Wills, 63 et seq.; Page, Wills, §§ 232-240; 1 Stimson's Am. St. Law, §§ 2700-2705.

## § 415. Undue influence.

The question whether a certain testamentary disposition was the result of the exercise of "undue influence" upon the testator is the subject of frequent litigation. The courts have not been very successful in defining what constitutes undue influence sufficient to defeat a testamentary provision, but it is stated, in a general way, that it must be such persuasion or importunity as to overpower the will of the testator, without convincing his judgment,<sup>58</sup>—that is, it involves a substitution of another person's will for that of testator.<sup>59</sup> But the mere fact that one persuades the testator to make a will in his favor, or induces him to do so by argument or flattery, does not, of itself, show undue influence,<sup>60</sup> and so "appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like," are legitimate, and do not affect the validity of the will.<sup>61</sup>

The question of undue influence is entirely distinct from that of the mental capacity of the testator to make a will, which will hereafter be considered;<sup>62</sup> but the fact that, though mentally capable of making a will, he is wanting in

<sup>58</sup> *Hall v. Hall*, L. R. 1 Prob. & Div. 481, 4 Gray's Cas. 144; *Coghill v. Kennedy*, 119 Ala. 641; *Herster v. Herster*, 122 Pa. St. 239, 9 Am. St. Rep. 95; *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 712.

<sup>59</sup> *Wingrove v. Wingrove*, 11 Prob. Div. 81, 4 Gray's Cas. 154; *Riley v. Sherwood*, 144 Mo. 354; *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276; *Schmidt v. Schmidt*, 47 Minn. 451; *Waddington v. Buzby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706.

<sup>60</sup> *McDaniel v. Crosby*, 19 Ark. 533; *Yoe v. McCord*, 74 Ill. 33; *Schofield v. Walker*, 58 Mich. 96, 106; *Bush v. Lisle*, 89 Ky. 393, *Chaplin, Wills*, 103; *Hughes v. Murtha*, 32 N. J. Eq. 288; *Trost v. Dingler*, 118 Pa. St. 259, 4 Am. St. Rep. 593; 1 *Woerner, Administration*, § 31.

<sup>61</sup> *Hall v. Hall*, L. R. 1 Prob. & Div. 481, 4 Gray's Cas. 144, *Chaplin, Wills*, 99; *In re Mondorf's Will*, 110 N. Y. 450; *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 712; *Bevelot v. Lestrade*, 153 Ill. 625.

<sup>62</sup> See post, § 503.

physical and mental vigor, is usually an important consideration in determining the question of undue influence.<sup>63</sup>

The fact that a beneficiary under the will sustains a confidential relation towards testator, such as that of attorney or guardian, does not of itself, according to some authorities, raise a presumption of undue influence sufficient to overthrow the will, though, under such circumstances, much slighter evidence of improper acts on the part of the beneficiary will be required than ordinarily.<sup>64</sup> By some decisions, however, the mere existence of the confidential relation raises a presumption that the will is invalid.<sup>65</sup> That a beneficiary who is not a near relative himself prepared the instrument is usually regarded as tending to show undue influence.<sup>66</sup>

#### § 416. Lapsed and void devises.

As a consequence of the "ambulatory" nature of a will, which prevents its operation until the death of the testator, the death of a devisee or legatee during the testator's lifetime will, in the absence of a statute to the contrary, render the

<sup>63</sup> Griffith v. Diffenderffer, 50 Md. 466; Sullivan v. Foley, 112 Mich. 1; Shailer v. Bumstead, 99 Mass. 112; Waddington v. Buzby, 45 N. J. Eq. 173, 14 Am. St. Rep. 706.

<sup>64</sup> Downey v. Murphey, 18 N. C. 82, 4 Gray's Cas. 156; Parfitt v. Lawless, L. R. 2 Prob. & Div. 462, 4 Gray's Cas. 146; Carter v. Dixon, 69 Ga. 82; Bancroft v. Otis, 91 Ala. 279; Denning v. Butcher, 91 Iowa, 425; In re Smith's Will, 95 N. Y. 516; Bigelow, Wills, 89.

<sup>65</sup> Connor v. Stanley, 72 Cal. 556, 1 Am. St. Rep. 84, note; Miller v. Miller, 187 Pa. St. 572; Hartman v. Strickler, 82 Va. 225; Carroll v. Hause, 48 N. J. Eq. 269, 27 Am. St. Rep. 469; Gay v. Gillilan, 92 Mo. 250, 1 Am. St. Rep. 712; Meek v. Perry, 36 Miss. 190, 244; 1 Woerner, Administration, § 32.

<sup>66</sup> Richmond's Appeal, 59 Conn. 226, 21 Am. St. Rep. 85; Coghill v. Kennedy, 119 Ala. 641; Montague v. Allan's Ex'r, 78 Va. 592, 49 Am. Rep. 384; Bush v. Delano, 113 Mich. 321; Yardley v. Cuthbertson, 108 Pa. St. 395, 56 Am. Rep. 218; In re Barney's Will, 70 Vt. 352; Barry v. Butlin, 1 Curt. Ecc. 637, 4 Gray's Cas. 137; Bigelow, Wills, 87, 89. Compare Carter v. Dixon, 69 Ga. 82.

gift absolutely void.<sup>67</sup> And so a devise or legacy to a corporation may lapse or become void by the dissolution of the corporation before testator's death.<sup>68</sup> The testator may, however, make a substitutionary gift of that particular property in case the other gift fails owing to the death of the beneficiary, or for other reasons, and this will be carried out by the courts.<sup>69</sup> The fact that the gift is in terms to one "and his heirs" does not, of itself, show any intention to make a substitutionary gift to the heirs, since this is a word merely of limitation, and not of purchase.<sup>70</sup> In some cases, however, the use of the words "and heirs" has been construed as constituting a substitutional gift to the heirs,<sup>71</sup> and this is the effect usually given to a provision for one "or his heirs."<sup>72</sup>

In most of the states there is at the present day a statutory provision naming certain persons who may take in case of the death of the beneficiary during the lifetime of the testator. In many states it is provided that a devise or bequest to a child or other descendant of the testator shall, in case of the death of the devisee or legatee before the testator, pass to the issue of such devisee or legatee.<sup>73</sup> In some, the same provision is made in favor of the issue of any devisee or leg-

<sup>67</sup> 1 Jarman, Wills, 307; 2 Woerner, Administration, § 434.

<sup>68</sup> Page, Wills, § 740; Merrill v. Hayden, 86 Me. 133; Crum v. Bliss, 47 Conn. 592.

<sup>69</sup> 1 Jarman, Wills, 308; Page, Wills, § 741; Gilmer's Estate, 154 Pa. St. 523; Rivers v. Rivers, 36 S. C. 302.

<sup>70</sup> Maxwell v. Featherston, 83 Ind. 339; In re Wells, 113 N. Y. 396; Kimball v. Story, 108 Mass. 382; Hand v. Marcy, 28 N. J. Eq. 59.

<sup>71</sup> Gilmer's Estate, 154 Pa. St. 523; Gittings v. McDermott, 2 Mylne & K. 69, 73; 2 Woerner, Administration, § 434.

<sup>72</sup> 2 Woerner, Administration, §§ 417, 434; Hand v. Marcy, 28 N. J. Eq. 59; O'Rourke v. Beard, 151 Mass. 9. See Keniston v. Adams, 80 Me. 290.

<sup>73</sup> 1 Stimson's Am. St. Law, § 2823(A).

atee who is a relation of the testator, while, in others, the issue of any devisee or legatee dying before the testator takes the gift, unless a contrary intention appears.<sup>74</sup>

— **Effect of residuary clause.**

One result of the theory that a devise of land was a present conveyance of the land, and of the rule that a will did not pass after-acquired land, was that a residuary devise of land, however general in its terms, was in its nature specific, as operating only on such land as the testator owned at the time of executing the will, and did not devise to another person, and was equivalent to a devise of such land by name or specific description. Consequently, although a devisee of specific land in the will died before testator, causing a "lapse" of the devise, the land could not pass under the residuary devise, but descended to the heir.<sup>75</sup> A different view has, however, been sometimes taken as to a devise which was originally void, it being held that it would pass under a residuary clause, on the theory that, being in effect a nullity from the beginning, it could not be regarded as excepted from the residuum.<sup>76</sup>

The rule that a residuary devise will not operate upon land included in a devise which has lapsed or has otherwise failed has been changed in England by the provision of the Wills Act that, unless a contrary intention appears from

<sup>74</sup> 1 Stimson's Am. St. Law, § 2823(B), (C). See Page, Wills, §§ 742, 743; 2 Woerner, Administration, § 435.

<sup>75</sup> Williams, Real Prop. (18th Ed.) 233; 1 Jarman, Wills, 609; Prescott v. Prescott, 7 Metc. (Mass.) 141; Williams v. Neff, 52 Pa. St. 326; Deford v. Deford, 36 Md. 168.

<sup>76</sup> Doe, Lessee of Stewart, v. Sheffield, 13 East, 526, 534; Doe d. Ferguson v. Roe, 1 Har. (Del.) 524, 528. That no such distinction between void and lapsed devises exists, see 1 Jarman, Wills, 610, note; Ligan v. Carroll, 3 Har. & McH. (Md.) 333, 338; Deford v. Deford, 36 Md. 168, 179.



the will, real estate comprised in any void or lapsed devise shall be included in the residuary devise.<sup>77</sup> There is a substantially similar provision in a number of states in this country.<sup>78</sup> The operation of such a statute is, however, much restricted by the statutes previously referred to, naming persons to take in case of the death of a beneficiary.

Even in the absence of a statute expressly making the residuary devise operative upon land included in a lapsed devise, the courts of a number of states have held that, since the passage of the statutes making a will pass after-acquired realty, the reason for treating the residuary devise as a specific provision no longer exists, and that consequently it covers all land included in a devise which has lapsed or become void.<sup>79</sup> In some states, however, a different view has been taken, it being held that such a statute as to after-acquired property does not cause land included in a lapsed devise to pass under the residuary clause.<sup>80</sup>

#### § 417. The revocation of a will.

A will remains subject to revocation by the testator at any time. Such revocation may be effected either by cancellation or destruction of the will, or by the execution of another testamentary instrument, either expressly revoking the former will, or making an inconsistent disposition of the property. The Statute of Frauds provides that no devise in writing of lands, tenements, or hereditaments, or any clause

<sup>77</sup> 7 Wm. IV. and 1 Vict. c. 26, § 25; 2 Woerner, Administration, § 438.

<sup>78</sup> 1 Stimson's Am. St. Law, § 2822.

<sup>79</sup> Thayer v. Wellington, 9 Allen (Mass.) 283, 296; Molineaux v. Raynolds, 55 N. J. Eq. 187; Cruikshank v. Home for Friendless, 113 N. Y. 337; Drew v. Wakefield, 54 Me. 291. See Johnson v. Holfield, 82 Ala. 123.

<sup>80</sup> Massey's Appeal, 88 Pa. St. 470; Rizer v. Perry, 58 Md. 112. See 2 Woerner, Administration, § 438.

thereof, shall be revocable otherwise than by some will or codicil in writing, or other writing declaring the same, signed in the presence of three or four witnesses, or by burning, canceling, tearing, or obliterating the previous will.<sup>81</sup> In this country the statutory provisions are usually of a substantially similar character.<sup>82</sup>

— By cancellation or destruction of the instrument.

In order that a will be revoked by cancellation or destruction, it is necessary that the act be done with the intention of revoking the will, *animo revocandi*, as it is expressed.<sup>83</sup> Consequently, the destruction of the will by accident<sup>84</sup> or by mistake, as when testator wrongly believes it to be invalid,<sup>85</sup> or during the insanity of the testator,<sup>86</sup> does not revoke it. On the other hand, the mere intention to revoke is insufficient unless accompanied by some act constituting a legal revocation.<sup>87</sup>

The act of destruction, whether by burning, tearing, or

<sup>81</sup> 29 Car. II. c. 3, § 6. See *Swinton v. Bailey*, 4 App. Cas. 70, 4 Gray's Cas. 328.

<sup>82</sup> 1 Stimson's Am. St. Law, §§ 2672, 2673.

<sup>83</sup> 1 Jarman, Wills, 118; 1 Woerner, Administration, § 48. The statute frequently contains a provision to this effect. 1 Stimson's Am. St. Law, § 2672(C).

<sup>84</sup> *Burtenshaw v. Gilbert*, Cowp. 52; *Burns v. Burns*, 4 Serg. & R. (Pa.) 295.

<sup>85</sup> *Giles v. Warren*, L. R. 2 Prob. & Div. 401, Chaplin, Wills, 348.

<sup>86</sup> *Rich v. Gilkey*, 73 Me. 595; *Brunt v. Brunt*, L. R. 3 Prob. & Div. 37, Chaplin, Wills, 329; *Lang's Estate*, 65 Cal. 19; *Sprigge v. Sprigge*, L. R. 1 Prob. & Div. 608, Chaplin, Wills, 356; *Forbing v. Weber*, 99 Ind. 588; *Delafield v. Parish*, 25 N. Y. 9.

<sup>87</sup> *Mundy v. Mundy*, 15 N. J. Eq. 290, Chaplin, Wills, 341; *Hoitt v. Hoitt*, 63 N. H. 475; *Kent v. Mahaffey*, 10 Ohio St. 204; *Delafield v. Parish*, 25 N. Y. 9. So, in *Doe d. Reed v. Harris*, 6 Adol. & E. 209, 4 Gray's Cas. 312, Chaplin, Wills, 349, it was decided that throwing the will on the fire, if it was snatched off by another person before more than the envelope was singed, did not constitute a revocation.

other means, must, to constitute a revocation, be carried through to its end, and consequently, if testator desists from his purpose after having partly torn or destroyed the instrument, there is no revocation, provided he would have made the act more complete had he not changed his mind.<sup>88</sup> A partial destruction is sufficient, however, if the testator supposed that the act was carried far enough for the purpose, and the preservation of the will in its mutilated condition by a third person will not affect the validity of the revocation.<sup>89</sup>

The cancellation or destruction, *animo revocandi*, of any essential part of the will, has the effect, unless the statute otherwise provides,<sup>90</sup> of revoking the will, as when the signature is scratched or erased,<sup>91</sup> or so much of the paper as contains the signature is torn off,<sup>92</sup> or the seal is destroyed.<sup>93</sup> The cancellation of a particular phrase or name in the will may revoke that particular provision; without revoking the will as a whole.<sup>94</sup>

<sup>88</sup> Doe d. Perkes v. Perkes, 3 Barn. & Ald. 489, 4 Gray's Cas. 310, Chaplin, Wills, 334; Elms v. Elms, 1 Swab. & Tr. 155, Chaplin, Wills, 335.

<sup>89</sup> Bibb v. Thomas, 2 W. Bl. 1043, 4 Gray's Cas. 307, Chaplin, Wills, 350; Sweet v. Sweet, 1 Redf. Surr. (N. Y.) 451, Chaplin, Wills, 342; White v. Casten, 46 N. C. 197, Chaplin, Wills, 344; Lawyer v. Smith, 8 Mich. 411, Chaplin, Wills, 369.

<sup>90</sup> Gay v. Gay, 60 Iowa, 415.

<sup>91</sup> Semmes v. Semmes, 7 Har. & J. (Md.) 388, Chaplin, Wills, 353; Townshend v. Howard, 86 Me. 285; Evans' Appeal, 58 Pa. St. 238, 244; Olmsted's Estate, 122 Cal. 224; In re White's Will, 25 N. J. Eq. 501; Woodfill v. Patton, 76 Ind. 575, 40 Am. Rep. 269.

<sup>92</sup> Bell v. Fothergill, L. R. 2 Prob. & Div. 148. But see Webster v. Yorty, 194 Ill. 408.

<sup>93</sup> This is so, even though the seal is not necessary to the validity of the will. Price v. Powell, 3 Hurl. & N. 341, 4 Gray's Cas. 323; Avery v. Pixley, 4 Mass. 460. See In re White's Will, 25 N. J. Eq. 501.

<sup>94</sup> Swinton v. Bailey, 4 App. Cas. 70, 4 Gray's Cas. 328; Larkins v. Larkins, 3 Bos. & P. 16, 4 Gray's Cas. 309; Bigelow v. Gillott, 123 (958)

In case the will of a decedent, which he is known to have made, cannot be found, it is presumed to have been destroyed by him with the intention of revoking it.<sup>95</sup> This presumption may, however, be rebutted by evidence to the contrary, as when it is shown that there was no change in the testator's desire to benefit the persons named in the will, or that the will was accessible to others, who might have destroyed it.<sup>96</sup>

— **Dependent relative revocation.**

"Where the act of destruction is connected with the making of another will, so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation or any other cause, the revocation fails also, and the original will remains in force."<sup>97</sup> This principle of "dependent relative" revocation, as it is termed, has been applied in the case of the cancellation of clauses in the will by testator with the intention of substituting other clauses, but without re-executing the will after making such alterations, and the cancellation has been held to be nugatory

Mass. 102, 4 Gray's Cas. 344; *In re Kirkpatrick's Will*, 22 N. J. Eq. 463; *Miles' Appeal from Probate*, 68 Conn. 237; *Gardner v. Gardiner*, 65 N. H. 230. But contra, in some states by statute, see *Law v. Law*, 83 Ala. 432; *Lovell v. Quitman*, 88 N. Y. 377; *Gay v. Gay*, 60 Iowa, 416.

<sup>95</sup> *Idley v. Bowen*, 11 Wend. (N. Y.) 227; *Knapp v. Knapp*, 10 N. Y. 276; *Foster's Appeal*, 87 Pa. St. 67, *Chaplin, Wills*, 364; *Harris v. Harris*, 10 Wash. 555; *In re Valentine's Will*, 93 Wis. 46.

<sup>96</sup> *Schultz v. Schultz*, 35 N. Y. 653, *Chaplin, Wills*, 358; *Patten v. Poulton*, 1 Swab. & Tr. 55, *Chaplin, Wills*, 361; *Harris v. Harris*, 10 Wash. 555.

<sup>97</sup> 1 *Jarman, Wills*, 119. See, also, 1 *Williams, Executors* (9th Ed.) 126 et seq.; *Onions v. Tyrer*, 2 Vern. 742, 4 Gray's Cas. 356.



as a revocation.<sup>98</sup> The same principle has been held to apply when the testator destroyed a will under the mistaken impression that a previous will would be thereby validated, and with the intention of setting up such former disposition.<sup>99</sup> The fact, however, that the act of destruction is accompanied by an intention to make another will in the future cannot prevent such act from operating as a revocation.<sup>100</sup>

### — Subsequent will.

As stated above, a will can, by force of the statute, be revoked by a subsequent writing only when such writing is executed as a will,—that is, only by a subsequent will.<sup>101</sup> Such revocation may result either from the language of the later instrument revoking the earlier will, or the later will may make a disposition of testator's property, or part thereof, inconsistent with the earlier disposition.<sup>102</sup> If the second will neither in terms revokes the previous will nor is inconsistent therewith, then both are in force, the later being in effect a codicil to the former instrument,<sup>103</sup> and, if the

<sup>98</sup> Winsor v. Pratt, 2 Brod. & B. 650, 4 Gray's Cas. 359; Wolf v. Bollinger, 62 Ill. 368; Doane v. Hadlock, 42 Me. 72; Wilbourn v. Shell, 59 Miss. 205; Gardner v. Gardiner, 65 N. H. 230; In re Penniman's Will, 20 Minn. 245 (Gil. 220), 18 Am. Rep. 368.

<sup>99</sup> Powell v. Powell, L. R. 1 Prob. & Div. 209, 4 Gray's Cas. 373.

<sup>100</sup> Semmes v. Semmes, 7 Har. & J. (Md.) 388, 4 Gray's Cas. 383; Townshend v. Howard, 86 Me. 285; Olmstead's Estate, 122 Cal. 224; Banks v. Banks, 65 Mo. 432; Brown v. Thorndike, 15 Pick. (Mass.) 388; 1 Woerner, Administration, § 48.

<sup>101</sup> 1 Stimson's Am. St. Law, § 2673. So it has been held that words written upon another part of the paper, to the effect that the will is revoked or "canceled," though signed by the testator, do not revoke the will, unless witnessed as required in the case of a will. Ladd's Will, 60 Wis. 187, 4 Gray's Cas. 347. But see Warner v. Warner, 37 Vt. 356, 4 Gray's Cas. 337; Evans' Appeal, 58 Pa. St. 238.

<sup>102</sup> 1 Jarman, Wills, 134-139; Bigelow, Wills, 136.

<sup>103</sup> 1 Jarman, Wills, 139; Wetmore v. Parker, 52 N. Y. 450; Gor-  
(960)



later will is only partially inconsistent with the earlier will, the latter remains in force in other respects.<sup>104</sup> The subsequent will may contain no provision other than that revoking the earlier will,<sup>105</sup> and it has the effect of revocation if it so provides, although the attempted disposition therein of the testator's property is for some reason invalid.<sup>106</sup>

The contents of a lost will may be shown for the purpose of establishing a revocation of a previous will.<sup>107</sup> But the mere fact of the execution of a later will, without evidence as to its contents, is not sufficient to show a revocation.<sup>108</sup>

A revocation by a will or codicil of a previous disposition of property is invalid if expressly made upon an assumption of fact which turns out to be mistaken.<sup>109</sup> But the fact that the revocation was the result of mistake cannot be shown by evidence extrinsic to the will,<sup>110</sup> and it has been held that

*don v. Whitlock*, 92 Va. 723; *Smith v. McChesney*, 15 N. J. Eq. 359.

<sup>104</sup> *Freeman v. Freeman*, 5 De Gex, M. & G. 704, 4 Gray's Cas. 297; *Lemage v. Goodban*, L. R. 1 Prob. & Div. 57, 4 Gray's Cas. 302; *Price v. Maxwell*, 28 Pa. St. 23; *Kelly v. Richardson*, 100 Ala. 584; *In re De Laveaga's Estate*, 119 Cal. 651; *Wetmore v. Parker*, 52 N. Y. 450.

<sup>105</sup> *Bayley v. Bailey*, 5 Cush. (Mass.) 245; *Barksdale v. Hopkins*, 23 Ga. 332.

<sup>106</sup> *Ex parte Ilchester*, 7 Ves. 348, 373; *Hairston v. Hairston*, 30 Miss. 276; *Morey v. Sohler*, 63 N. H. 507; *Burns v. Travis*, 117 Ind. 44.

<sup>107</sup> *Caeman v. Van Harke*, 33 Kan. 333; *Wallis v. Wallis*, 114 Mass. 510.

<sup>108</sup> *Hitchins v. Basset*, 2 Salk. 592, 4 Gray's Cas. 295; *In re Sternberg's Estate*, 94 Iowa, 305.

<sup>109</sup> *Campbell v. French*, 3 Ves. 321, 4 Gray's Cas. 358, where a revocation of a provision in favor of certain persons, "they being all dead," was held to be inoperative, they being alive. See, also, *Doe d. Evans v. Evans*, 10 Adol. & E. 228.

<sup>110</sup> *Gifford v. Dyer*, 2 R. I. 99, 4 Gray's Cas. 386; *Skipwith v. Cabell's Ex'r*, 19 Grat. (Va.) 758, 4 Gray's Cas. 387; *Dunham v. Averill*, 45 Conn. 61; *Hayes v. Hayes*, 45 N. J. Eq. 461.

even a mistake apparent in the will does not defeat the revocation if it is not based on information received from others, but the matter is within the personal knowledge of testator.<sup>111</sup> A revocation, moreover, which is stated to be based upon certain advice given testator, has been supported, though the advice was mistaken, since it was the advice on which testator acted, and as to that there was no mistake.<sup>112</sup>

— **Marriage or birth of issue.**

Apart from statute, the will of a man is not revoked by his marriage alone.<sup>113</sup> In some states, however, though there is no express statutory change of this rule, it has been decided that the statutes changing the common-law rights of a married woman as regards her interest in the husband's estate on his death without issue have, by implication, made a change in the rule, and that the husband's marriage does revoke the will.<sup>114</sup>

At common law, the marriage of a woman revokes her will, for the reason, it is said, that, since the marriage destroys her right to make or revoke a will, if marriage did not in itself cause a revocation, the will would stand as a permanent disposition of her property.<sup>115</sup> This rule is a positive rule of law, and evidence is not admissible to show a

<sup>111</sup> *Mendinhall's Appeal*, 124 Pa. St. 387.

<sup>112</sup> *Attorney General v. Lloyd*, 1 Ves. Sr. 32, 4 Gray's Cas. 357; 1 Jarman, Wills, 147; *Newton v. Newton*, 12 Ir. Ch. 118, 4 Gray's Cas. 437; *Skipwith v. Cabell's Ex'r*, 19 Grat. (Va.) 758, 4 Gray's Cas. 387.

<sup>113</sup> 1 Jarman, Wills, 111.

<sup>114</sup> *Brown v. Scherrer*, 5 Colo. App. 255, 21 Colo. 481; *Tyler v. Tyler*, 19 Ill. 151; *American Board of Com'rs for Foreign Missions v. Nelson*, 72 Ill. 564; *Morgan v. Ireland*, 1 Idaho, 786. Contra, *Hulett v. Carey*, 66 Minn. 327; *Hoitt v. Hoitt*, 63 N. H. 475; *Goodsell's Appeal*, 55 Conn. 171.

<sup>115</sup> 1 Jarman, Wills, 110; *Hodsden v. Lloyd*, 2 Brown Ch. 534; *Garrett v. Dabney*, 27 Miss. 335. So by statute in a number of states. 1 Stimson's Am. St. Law, § 2676(A).

contrary intention on the part of testatrix.<sup>116</sup> In several states it has been held that this rule does not apply when the common-law restriction upon the right of a married woman to make a will no longer exists.<sup>117</sup> An express statutory provision in accordance with the common-law rule has, however, been held not to be impliedly repealed by a statute giving testamentary capacity to married women;<sup>118</sup> and the common-law rule has been regarded as confirmed by a provision, in the statute regarding the revocation of wills, that nothing therein contained shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.<sup>119</sup>

By the common-law rule, generally recognized as in force in this country, in the absence of a statutory change, the marriage of a man, if followed by the birth of a child, revokes his will previously made.<sup>120</sup> This rule is based, it is said, upon a tacit condition, annexed to the will, that, in case of such a total change in testator's circumstances, the will shall be void,<sup>121</sup> and consequently evidence of a contrary intention on the part of the testator is, by the weightiest de-

<sup>116</sup> *Nutt v. Norton*, 142 Mass. 242; *Hoitt v. Hoitt*, 63 N. H. 498.

<sup>117</sup> *Ward's Will*, 70 Wis. 251; *In re Emery*, 81 Me. 275, *Chaplin, Wills*, 313; *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 329; *Webb v. Jones*, 36 N. J. Eq. 163; *Noyes v. Southworth*, 55 Mich. 173, 54 Am. Rep. 359; *Morton v. Onion*, 45 Vt. 145; *In re Tuller's Will*, 79 Ill. 99. *Contra*, *Swan v. Hammond*, 138 Mass. 45.

<sup>118</sup> *Brown v. Clark*, 77 N. Y. 369, *Chaplin, Wills*, 315; *In re Kaufman's Will*, 131 N. Y. 620, *Chaplin, Wills*, 317.

<sup>119</sup> *Shorten v. Judd*, 60 Kan. 73; *Swan v. Hammond*, 138 Mass. 45.

<sup>120</sup> 1 *Jarman, Wills*, 110; *Christopher v. Christopher*, 2 Dickens, 445, 4 *Gray's Cas.* 390.

In New Hampshire it has been held that the marriage and birth of issue no longer effect a revocation, in view of the statute which gives to a widow and child not provided for in the will the same share as if decedent had died intestate. *Hoitt v. Hoitt*, 63 N. H. 498.

<sup>121</sup> *Kenebel v. Scrafton*, 2 East, 530, 4 *Gray's Cas.* 394.

cisions, not admissible.<sup>122</sup> The rule that marriage and birth of issue revokes the will does not, however, apply if the future wife and the issue of the marriage are provided for by the will,<sup>123</sup> and occasionally, by statute, a provision for the issue alone is sufficient to prevent its application.<sup>124</sup>

The birth of a child does not, apart from statute, affect a man's previous disposition of his property by will.<sup>125</sup>

There are in most of the states express statutory provisions as to the effect of marriage or birth of issue in revoking a will. In some states a will is revoked by marriage and birth of issue, unless provision for such issue is made in the will or by settlement, or they are in such way mentioned in the will as to show an intention not to provide for them. In several states the marriage alone of the testator revokes the will, subject, in some states, to the condition that he leaves a widow for whom he does not provide by marriage settlement or in the will, or does not so mention her in the will as to show an intention not to provide for her. And in some states a will made before the birth of issue, which makes no mention of possible issue, is in effect revoked if the testator leave a child.<sup>126</sup>

#### — Alienation of land.

The conveyance by the testator of land, which would oth-

<sup>122</sup> *Marston v. Roe*, 8 Adol. & E. 14, 4 Gray's Cas. 403; *Chicago, B. & Q. R. Co. v. Wasserman* (C. C.) 22 Fed. 872; *Baldwin v. Spriggs*, 65 Md. 373. See *Nutt v. Norton*, 142 Mass. 242; *Hoitt v. Hoitt*, 63 N. H. 498. Contra, *Wheeler v. Wheeler*, 1 R. I. 364.

<sup>123</sup> *Kenebel v. Scrafton*, 2 East, 530, 4 Gray's Cas. 394; *Marston v. Roe*, 8 Adol. & E. 14, 4 Gray's Cas. 403; *Warner v. Beach*, 4 Gray (Mass.) 162; *Baldwin v. Spriggs*, 65 Md. 373.

<sup>124</sup> 1 *Stimson's Am. St. Law*, § 2676(C).

<sup>125</sup> *Doe d. White v. Barford*, 4 Maule & S. 10, 4 Gray's Cas. 402; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506; *Goodsell's Appeal from Probate*, 55 Conn. 171. Contra, *McCullum v. McKenzie*, 26 Iowa, 510.

<sup>126</sup> 1 *Stimson's Am. St. Law*, § 2676.

erwise pass under a will previously made, necessarily withdraws such land from the operation of the will.<sup>127</sup> When there is merely a contract to convey, the vendor is, as before stated,<sup>128</sup> a mere trustee for the purchaser, and the legal title alone passes under his previous devise of the land, the right to the purchase money passing, in the absence of statute, to the personal representative.<sup>129</sup> In some states, however, the statute provides that, on the death of the vendor of land, the unpaid purchase money shall pass under the devise of the land, in place, as it were, of the land.<sup>130</sup>

So far as the common-law rule that the will operates only on land owned by testator at the time of its execution may still remain in force in any jurisdiction, the reconveyance to testator of land conveyed by him after the making of the will cannot render the will operative as to such land.<sup>131</sup> And, apart from any change in the law brought about by the modern statutes, a conveyance by the testator after the making of his will, if it transfers the legal title in fee simple, is effective as a revocation, even though, by the same instrument, another estate is created in favor of himself, as in the case of a declaration of trust in his own favor.<sup>132</sup> Under the statutory rule which now prevails in England, and in most, if not all, of the states, that the will operates on such land as the testator has at the time of his death, a conveyance by testator after making his will cannot prevent the operation of the will upon the land conveyed, if it is recon-

<sup>127</sup> 1 Jarman, Wills, 129.

<sup>128</sup> Ante, § 110.

<sup>129</sup> 1 Jarman, Wills, 129; *Bender v. Luckenbach*, 162 Pa. St. 18; *Skinner v. Newberry*, 51 Ill. 203; *Bruck v. Tucker*, 32 Cal. 426. See ante, § 112.

<sup>130</sup> 1 Woerner, Administration, § 53.

<sup>131</sup> 1 Jarman, Wills (4th Ed.) 147.

<sup>132</sup> *Cave v. Holford*, 3 Ves. 650; *Brydges v. Chandos*, 2 Ves. Jr. 417; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258; *Jones v. Hartley*, 2 Whart. (Pa.) 103.



vayed or title is in any way revested in the testator before his death; and in many jurisdictions there is an express provision that a conveyance shall not prevent the operation of the will with respect to such an estate as testator has at the time of his death, unless, in some states, the intention to revoke is expressed in the conveyance.<sup>133</sup>

A conveyance by a testator was held in England, as the law formerly stood, to effect a revocation, although the conveyance was void, either for want of capacity in the grantee, or for want of the proper formalities.<sup>134</sup> This rule is no longer in force in England, on the theory, it is said, that, as a valid conveyance no longer effects a revocation if the title becomes revested in testator, one which is invalid can have no greater effect.<sup>135</sup> In this country there seems to be no explicit decision that an invalid conveyance could in any case constitute revocation, though there are *dicta* to such an effect,<sup>136</sup> and a conveyance which is voidable because procured by fraud has been here held not to cause a revocation.<sup>137</sup>

#### § 418. Children or issue omitted from will.

In most states there is a statutory provision that, if a child living or leaving issue at the testator's death was born after the execution of the will, such child or issue shall take the share to which he or they would have been entitled if tes-

<sup>133</sup> Wills Act, 7 Wm. IV. and 1 Vict. c. 26, § 23; 1 Stimson's Am. St. Law, § 2810.

<sup>134</sup> 1 Jarman, Wills (4th Ed.) 165; Mountague v. Jeoffereys, Moore, 429, 4 Gray's Cas. 682; Hick v. Mors, Amb. 215, 4 Gray's Cas. 685.

<sup>135</sup> 1 Jarman, Wills, 133.

<sup>136</sup> See Walton v. Walton, 7 Johns. Ch. (N. Y.) 258; Graham v. Burch, 47 Minn. 171; Bigelow, Wills, 134. But see Bennett v. Gaddis, 79 Ind. 347.

<sup>137</sup> Graham v. Burch, 47 Minn. 171. Contra in England. Simpson v. Walker, 5 Sim. 1. See 1 Redfield, Wills (4th Ed.) 344.

tator had died intestate. In a number of the states, such a provision applies only in case the child or issue were not provided for otherwise by testator, or were not intentionally omitted.<sup>138</sup> In a number of states, statutes of this character, entitling an omitted child to the share which he would have had if deceased had died intestate, are not restricted in their application to children born after the execution of the will, but apply in the case of any child, usually whether that child was omitted intentionally or unintentionally.<sup>139</sup>

### § 419. Revival of will.

In the case of a will which is revoked by an express statement to that effect in a subsequent will, or by inconsistent provisions therein, the question has frequently arisen as to the effect of a subsequent revocation of the revoking will. In England it was held by the common-law courts that the effect was to "revive" or put in force again the provisions of the earlier will, if this had not been destroyed, on the theory that, as the second will had no operation until testator's death, if it was revoked it could not operate as a revocation of the earlier will.<sup>140</sup> The ecclesiastical courts, however, held that the question of revival was one of intention purely, to be decided according to the facts and circumstances of the particular case.<sup>141</sup> This question is there set at rest by the Wills Act,<sup>142</sup> which provides "that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof,

<sup>138</sup> 1 Stimson's Am. St. Law, § 2843.

<sup>139</sup> 1 Stimson's Am. St. Law, § 2842. See Page, Wills, § 291;

1 Woerner, Administration, § 55.

<sup>140</sup> Goodright v. Glazier, 4 Burrows, 2512, 4 Gray's Cas. 434; 1 Jarman, Wills (4th Ed.) 136.

<sup>141</sup> Moore v. Moore, 1 Phillim. 357; Usticke v. Bawden, 2 Addams, 116.

<sup>142</sup> 7 Wm. IV. and 1 Vict. c. 26, § 22.

or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same," it being held thereunder that the cancellation or destruction of the revoking will cannot revive the previous will.<sup>143</sup>

In this country the view of the English ecclesiastical courts, that the question of revival is one purely of intention, has occasionally been adopted,<sup>144</sup> with the presumption, it seems, in the absence of evidence, against a revival in such a case.<sup>145</sup> In a few jurisdictions, however, the view is taken that the revocation of the subsequent will *ipso facto* revives the earlier one;<sup>146</sup> and in some this view is applied to cases in which the second will revoked the first will merely by reason of inconsistency therewith, and not by an express statement to that effect.<sup>147</sup> In one state, at least, the rule which prevails by statute in England has been adopted, in the absence of any local statute on the subject.<sup>148</sup>

There are, in many states, statutory provisions on this subject, it being sometimes provided, as in England, that a will once revoked can be revived only by a re-execution thereof, or by a codicil duly executed, while in others the canceling, destruction, or revocation of the second will does not revive the first will, unless such intent appear in the

<sup>143</sup> 1 Jarman, Wills, § 126; 1 Williams, Executors (9th Ed.) 163.

<sup>144</sup> Pickens v. Davis, 134 Mass. 252, 4 Gray's Cas. 444; In re Gould's Will, 72 Vt. 316; McClure v. McClure, 86 Tenn. 173. See Bohanon v. Walcot, 1 How. (Miss.) 336; Randall v. Beatty, 31 N. J. Eq. 643.

<sup>145</sup> Pickens v. Davis, 134 Mass. 252, 4 Gray's Cas. 444. See 15 Harv. Law Rev. 142.

<sup>146</sup> Taylor v. Taylor, 2 Nott & McC. (S. C.) 482; Peck's Appeal from Probate, 50 Conn. 562; Flintham v. Bradford, 10 Pa. St. 82.

<sup>147</sup> Scott v. Fink, 45 Mich. 241; Cheever v. North, 106 Mich. 390; Colvin v. Warford, 20 Md. 357. See Hawes v. Nicholas, 72 Tex. 481; Peck's Appeal from Probate, 50 Conn. 562.

<sup>148</sup> Harwell v. Lively, 30 Ga. 315.

terms of the revocation, or the first will be duly republished.<sup>149</sup>

### § 420. Republication.

A will may be republished so as to give the words of the will the same effect as if the will had been originally executed at the time of such republication,—that is, so as to make it “speak” as of that time.<sup>150</sup> Under the law as it formerly existed in England, restricting the operation of a devise of lands to such lands as were owned by the testator at the time of execution of the will, and in those states in this country where the same rule still prevails, the effect of a republication is important, as it brings lands acquired between the date of execution and of republication within the operation of a general devise.<sup>151</sup> But since the general change of the law in this respect, the doctrine of republication has lost much of its importance, and it calls for consideration now chiefly in connection with the possibility of giving effect to a will originally invalid, or which has been revoked.<sup>152</sup>

The republication may consist of a re-execution of the instrument with the same formalities as are necessary in the case of an absolutely new will. Accordingly, while, previous to the Statute of Frauds, it might be by means of an oral

<sup>149</sup> 1 Stimson's Am. St. Law, §§ 2678, 2679.

The destruction of a codicil reviving a former revoked will has been decided not to have the effect of rendering the revival inoperative, if there was no intention that it should have that effect. *James v. Shrimpton*, 1 Prob. Div. 431, 4 Gray's Cas. 443.

<sup>150</sup> 1 Jarman, Wills, 159; Williams, Executors (9th Ed.) 170.

<sup>151</sup> *Beckford v. Parnecott*, Cro. Eliz. 493, 4 Gray's Cas. 419; *Barnes v. Crow*, 4 Brown Ch. 2, 4 Gray's Cas. 421.

<sup>152</sup> See *Burge v. Hamilton*, 72 Ga. 568; *Brown v. Riggin*, 94 Ill. 560; *Walton's Estate*, 194 Pa. St. 528; *McCurdy v. Neall*, 42 N. J. Eq. 333; *Skinner v. American Bible Soc.*, 92 Wis. 209.

declaration even in the case of land,<sup>153</sup> since that time signing and attestation are necessary.<sup>154</sup> The making and execution of a codicil to a will has likewise the effect, in the absence of any appearance of a contrary intention, of a republication of the will, and it is immaterial whether the codicil expressly so provides, or whether it is actually annexed to the will.<sup>155</sup> In the absence of an expression of a contrary intention, the republication of a will, whether by re-execution, or by the making of a codicil, is of the will as changed by any pre-existing codicils, they being in effect a part of the will.<sup>156</sup> The mere fact that the will is referred to by its original date does not take the case out of the rule.<sup>157</sup>

<sup>153</sup> *Beckford v. Parnecott*, Cro. Eliz. 493, 4 Gray's Cas. 419.

<sup>154</sup> *Jackson v. Potter*, 9 Johns. (N. Y.) 312; *Love v. Johnston*, 34 N. C. 355, 1 Woerner, Administration, § 56.

<sup>155</sup> 1 Williams, Executors (9th Ed.) 164; *Barnes v. Crow*, 4 Brown Ch. 2, 4 Gray's Cas. 421; *Van Alstyne v. Van Alstyne*, 28 N. Y. 375; *In re Murfield's Will*, 74 Iowa, 479; *Hobart v. Hobart*, 154 Ill. 610; *Pope v. Pope*, 95 Ga. 87; *McCurdy v. Neall*, 42 N. J. Eq. 333.

<sup>156</sup> 1 Williams, Executors (9th Ed.) 171; *Crosbie v. MacDoual*, 4 Ves. 610, 4 Gray's Cas. 426.

<sup>157</sup> *Green v. Tribe*, 9 Ch. Div. 231, 4 Gray's Cas. 428.



## CHAPTER XXI.

### DEDICATION.

§ 421. The nature of dedication.

422. Mode of dedication.

423. Acceptance.

424. Effect of dedication.

The dedication of land for public use involves a declaration by the owner, by either word or act, of an intention that the land shall be thereafter used by the public, and to that extent it divests the rights of the owner of the land. By statute, occasionally, a dedication made in a particular manner vests in the public, not a right of user only, but the ownership of the land.

The dedication must usually be accepted in order to impose any liability upon the municipality as the representative of the public, and, by some decisions, in order to render the dedication irrevocable. Such an acceptance will, in some cases, be presumed from user by the public.

§ 421. The nature of dedication.

A highway may be created by the dedication of land for highway purposes by the owner thereof, this being in effect a declaration, by word or act, of his intention that the land shall be used by the public for highway purposes.<sup>1</sup> Land may likewise be dedicated for use as a park, common, or square.<sup>2</sup> It has also been decided in this country that land

<sup>1</sup> Angell, Highways, § 132 et seq.; Elliott, Roads & S. c. 5.

<sup>2</sup> Baker v. Johnston, 21 Mich. 319; City of Cincinnati v. White's Lessee, 6 Pet. (U. S.) 431, 4 Gray's Cas. 799; Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 58 Am. Rep. 143; Com. v. Rush,

may be dedicated for use by the public as a wharf or landing place,<sup>3</sup> as a cemetery,<sup>4</sup> or for school purposes.<sup>5</sup>

In some jurisdictions in this country the common-law theory of dedication has been greatly extended by decisions that land may be dedicated, not only for use by the public, but for use by a small portion of the public belonging to a particular class, this being presumably due to a desire to uphold gifts which otherwise would fail for want of a sufficient conveyance. Thus, gifts for charitable and religious purposes, though merely oral, have been supported on the theory of dedication.<sup>6</sup>

14 Pa. St. 186; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554; *Rhodes v. Town of Brightwood*, 145 Ind. 21.

<sup>3</sup> *City of Napa v. Howland*, 87 Cal. 84; *Village of Mankato v. Willard*, 13 Minn. 13 (Gil. 1), 97 Am. Dec. 208; *Portland & W. V. R. Co. v. City of Portland*, 14 Or. 188, 58 Am. Rep. 299; *Penny Pot Landing v. City of Philadelphia*, 16 Pa. St. 79; *City of Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318; *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407. Contra, *Pearsall v. Post*, 20 Wend. (N. Y.) 111; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Thomas v. Flord*, 63 Md. 346, 52 Am. Rep. 513; *Horn v. People*, 26 Mich. 221; *O'Neill v. Annett*, 27 N. J. Law, 290, 72 Am. Dec. 364.

<sup>4</sup> *Davidson v. Reed*, 111 Ill. 167, 53 Am. Rep. 613; *Hunter v. Trustees of Sandy Hill*, 6 Hill (N. Y.) 407; *Hagaman v. Dittmar*, 24 Kan. 42; *Pierce v. Spafford*, 53 Vt. 394; *Mowry v. City of Providence*, 10 R. I. 52.

<sup>5</sup> *Carpenteria School Dist. v. Heath*, 56 Cal. 478; *Chapman v. Floyd*, 68 Ga. 455; *Klinkener v. School Directors of McKeesport*, 11 Pa. St. 444; *Board of Education of Incorporated Village of Van Wert v. Edson*, 18 Ohio St. 221; *Board of Regents for Normal School Dist. No. 3 v. Painter*, 102 Mo. 464.

<sup>6</sup> *Beatty v. Kurtz*, 2 Pet. (U. S.) 566, 3 Gray's Cas. 794; *City of Hannibal v. Draper*, 15 Mo. 634; *Atkinson v. Bell*, 18 Tex. 474; *Williams v. First Presbyterian Soc. in Cincinnati*, 1 Ohio St. 478. Compare *Home for Care of the Inebriate v. City & County of San Francisco*, 119 Cal. 534; *Trustees of Methodist Episcopal Church of Hoboken v. City of Hoboken*, 33 N. J. Law, 13, 97 Am. Dec. 696.

But the courts have refused to support a dedication for railroad purposes in favor of a private corporation. *Lake Erie & W. R.* (972)

A dedication may be made subject to certain reservations or restrictions upon the freedom of use of the land by the public. Thus, a highway may be dedicated, to be used only at certain seasons,<sup>7</sup> or subject to a right in the dedicator or in others to use the land for certain purposes, or at certain times.<sup>8</sup> And the dedication of a highway may be, not for general highway purposes, but for use by pedestrians only, or for a certain class of vehicles.<sup>9</sup>

### § 422. Mode of dedication.

A dedication need not be by any formal act or declaration, but it is sufficient if in any way the owner of the land indicates an intention to devote the land to the public use.<sup>10</sup> The act of dedication is, however, affirmative in character, and the intention to dedicate must be clearly shown. Consequently, the mere acquiescence by the owner of land in the use thereof by the public does not of itself show a dedication.<sup>11</sup>

Co. v. Whitham, 155 Ill. 514, 46 Am. St. Rep. 355; Todd v. Pittsburg, Ft. W. & C. R. Co., 19 Ohio St. 514.

<sup>7</sup> Hughes v. Bingham, 135 N. Y. 347.

<sup>8</sup> Mercer v. Woodgate, L. R. 5 Q. B. 26, 3 Gray's Cas. 790; City of Noblesville v. Lake Erie & W. R. Co., 130 Ind. 1; City of DuBuque v. Benson, 23 Iowa, 248; Ayres v. Pennsylvania R. Co., 52 N. J. Law, 405.

<sup>9</sup> Stafford v. Coyney, 7 Barn. & C. 257; Trustees of Methodist Episcopal Church of Hoboken v. City of Hoboken, 33 N. J. Law, 13, 97 Am. Dec. 696.

<sup>10</sup> Quinn v. Anderson, 70 Cal. 454; Godfrey v. City of Alton, 12 Ill. 29, 52 Am. Dec. 476; Williams v. Wiley, 16 Ind. 362; Hall v. McLeod, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; Wright v. Tukey, 3 Cush. (Mass.) 290.

<sup>11</sup> Cunningham v. Hendricks, 89 Wis. 632; City of Chicago v. Chicago, R. I. & P. Ry. Co., 152 Ill. 561; Steele v. Sullivan, 70 Ala. 589; Cyr v. Madore, 73 Me. 53; Hayden v. Stone, 112 Mass. 346; Stacey v. Miller, 14 Mo. 478; Lewis v. City of Portland, 25 Or. 133, 42 Am. St. Rep. 772; Weiss v. Borough of South Bethlehem, 136 Pa. St. 294; Worthington v. Wade, 82 Tex. 26; Hibberd v. Mellville (Cal.) 33 Pac. 201; Irwin v. Dixon, 9 How. (U. S.) 10; McKey v. Village of Hyde Park, 134 U. S. 84.

But the fact that the public is allowed to use the land, when taken in connection with other facts, may be sufficient to show a dedication.<sup>12</sup> The fact that the owner of the land continues to pay taxes thereon,<sup>13</sup> or that he makes conveyances of the land,<sup>14</sup> may tend to rebut any presumption of dedication otherwise arising, and, in the case of land used as a highway, the fact that the owner erects bars and gates thereon are strong evidence in rebuttal of the rights of the public.<sup>15</sup> But while the intention to dedicate must be clearly shown, and the landowner himself may, according to some decisions, testify as to his intention,<sup>16</sup> he cannot, if his acts are such as to show an intention to dedicate, assert, after the making of expenditures by the municipality or individuals on the strength of such acts, that he had no intention to dedicate.<sup>17</sup>

As a general rule, if the owner of land who has laid it off

<sup>12</sup> *New Orleans, J. & G. N. R. Co. v. Moye*, 39 Miss. 374; *State v. Birmingham*, 74 Iowa, 407; *Schwerdtle v. Placer County*, 108 Cal. 589; *Tupper v. Huson*, 46 Wis. 646; *City of Chicago v. Chicago, R. I. & P. Ry. Co.*, 152 Ill. 561; *Weiss v. Borough of South Bethlehem*, 136 Pa. St. 294.

<sup>13</sup> *Mansur v. State*, 60 Ind. 357; *City of Topeka v. Cowee*, 48 Kan. 345; *Case v. Favier*, 12 Minn. 89 (Gil. 48); *Bauman v. Boeckeler*, 119 Mo. 189. But payment of taxes is but slight evidence against a dedication. See *Rhodes v. Town of Brightwood*, 145 Ind. 21; *Getchell v. Benedict*, 57 Iowa, 121; *Town of San Leandro v. Le Breton*, 72 Cal. 170; *City of Ottawa v. Yentzer*, 160 Ill. 509.

<sup>14</sup> *Hall v. City of Baltimore*, 56 Md. 187; *Case v. Favier*, 12 Minn. 89 (Gil. 48).

<sup>15</sup> *Jones v. Phillips*, 59 Ark. 35; *People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22; *Bidinger v. Bishop*, 76 Ind. 244; *State v. Green*, 41 Iowa, 693; *Com. v. Inhabitants of Newbury*, 2 Pick. (Mass.) 51.

<sup>16</sup> *Bidinger v. Bishop*, 76 Ind. 244; *Goodfellow v. Riggs*, 88 Iowa, 540; *City of Chicago v. Chicago, R. I. & P. Ry. Co.*, 152 Ill. 561; *Helm v. McClure*, 107 Cal. 199. Contra, *Perkins v. Fielding*, 119 Mo. 149.

<sup>17</sup> *Bigelow, Estoppel* (5th Ed.) 635; *Angell, Highways*, § 156; *Elliot, Roads & S.* §§ 125, 168.

into lots, with streets and alleys intersecting the same, sells his lots with reference to such streets and alleys, or with reference to a plat on which they appear, this constitutes a dedication to the public of the land covered by such streets or alleys.<sup>18</sup> By some decisions, however, such a sale of lots with reference to a street which has not yet been opened is not regarded as vesting any rights in the public,<sup>19</sup> though the purchasers of such lots would no doubt acquire a right of way in the land so referred to as a highway.<sup>20</sup> A mere description of land, upon the conveyance thereof, as bounded on a certain street, as extended, or as shown on a city map, does not involve a dedication of land for such street.<sup>21</sup>

The question whether a dedication has been made is usually one of fact for the jury under instructions as to what may constitute a dedication.<sup>22</sup>

#### —Statutory dedication.

In the statutes authorizing the record of a plat of a sub-

<sup>18</sup> *Irwin v. Dixon*, 9 How. (U. S.) 10, 31; *Trustees of Methodist Episcopal Church of Hoboken v. City of Hoboken*, 33 N. J. Law, 13, 97 Am. Dec. 696; *Meier v. Portland Cable Ry. Co.*, 16 Or. 500; *City of Baltimore v. Frick*, 82 Md. 77; *Fossion v. Landry*, 123 Ind. 136; *Quicksall v. City of Philadelphia*, 177 Pa. St. 301; *Bartlett v. City of Bangor*, 67 Me. 460; *Briel v. City of Natchez*, 48 Miss. 423; *Elliott, Roads & S.* (2d Ed.) §§ 117, 118; *Jones, Easements*, § 430.

<sup>19</sup> *In re Eleventh Avenue*, 81 N. Y. 436; *Prescott v. Edwards*, 117 Cal. 298.

<sup>20</sup> See *ante*, § 320.

<sup>21</sup> *City of Omaha v. Hawver*, 49 Neb. 1; *Sandford v. City of Covington*, 12 Ky. Law Rep. 450, 14 S. W. 497; *Hancock v. City of Philadelphia*, 175 Pa. St. 124.

<sup>22</sup> *Grube v. Nichols*, 36 Ill. 92; *Wood v. Hurd*, 34 N. J. Law, 87; *New Orleans, J. & G. N. R. Co. v. Moye*, 39 Miss. 374; *City of Hartford v. New York & N. E. R. Co.*, 59 Conn. 250; *City of Elgin v. Beckwith*, 119 Ill. 367; *Adams v. Iron Cliffs Co.*, 78 Mich. 278, 18 Am. St. Rep. 441; *Morse v. Zeize*, 34 Minn. 35; *McVee v. City of Watertown*, 92 Hun (N. Y.) 306; *Folsom v. Town of Underhill*, 36 Vt. 580.



division of land made by the owner thereof,<sup>23</sup> there is usually a provision that the strips or pieces of land which the owner, as indicated on the plat, intends shall be used by the public for streets, parks, and the like, shall be regarded as dedicated to the public. These statutes usually contain minute requirements in regard to the form and authentication of the plat, and, if these requirements are not complied with, the plat does not constitute a statutory dedication, though it may, in connection with sales of land with reference thereto, or other acts, constitute evidence of a common-law dedication.<sup>24</sup>

### § 423. Acceptance.

In order that a dedication, or, rather, an offer of dedication, may be effective for the purpose of imposing burdens and liabilities upon the public authorities, it is necessary that it be accepted by the public,<sup>25</sup> and, by numerous decisions, such an acceptance is also necessary for the purpose of rendering the offer of dedication irrevocable by the dedicator.<sup>26</sup>

<sup>23</sup> See ante, § 389.

<sup>24</sup> *Marsh v. Village of Fairbury*, 163 Ill. 401; *Ruddiman v. Taylor*, 95 Mich. 547; *Campbell v. City of Kansas*, 102 Mo. 326; *Incorporated Village of Fulton's Lessee v. Mehrenfeld*, 8 Ohio St. 440; *Pillsbury v. Alexander*, 40 Neb. 242; *Elliott, Roads & S.* § 114.

<sup>25</sup> *City & County of San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 545; *City of Denver v. Denver & S. F. Ry. Co.*, 17 Colo. 583; *State v. Atherton*, 16 N. H. 203; *Rhodes v. Town of Brightwood*, 145 Ind. 21; *Booraem v. North Hudson County Ry. Co.*, 39 N. J. Eq. 465; *Downend v. Kansas City*, 71 Mo. App. 529; *Elliott, Roads & S.* (2d Ed.) § 150.

<sup>26</sup> *Holdane v. Trustees of Village of Cold Spring*, 21 N. Y. 474; *Prescott v. Edwards*, 117 Cal. 298; *Riley v. Hammel*, 38 Conn. 574; *City of Chicago v. Drexel*, 141 Ill. 89; *Littler v. City of Lincoln*, 106 Ill. 353; *Clendenin v. Maryland Construction Co.*, 86 Md. 80; *Baker v. Johnston*, 21 Mich. 319; *Hayden v. Stone*, 112 Mass. 346; *City of St. Louis v. St. Louis University*, 88 Mo. 155; *Price v. Inhabitants of Town of Breckenridge*, 92 Mo. 378; *Baldwin v. City of Buffalo*, 35 N. Y. 375; *Simmons v. Cornell*, 1 R. I. 519. Contra, (976)

According to some decisions, however, there is a presumption of acceptance if the dedication is purely beneficial in character, imposing no burden on the public,<sup>27</sup> and sometimes the statute is construed as dispensing with the necessity of acceptance.<sup>28</sup> The failure of the public to accept does not in any case affect the rights of the purchasers of lots with reference to the proposed highway or park to assert rights of user therein for the benefit of their property, since the vendor is estopped to deny the existence of such rights in their favor.<sup>29</sup>

The acceptance may be by formal action on the part of the state or municipal authorities,<sup>30</sup> but this is not necessary. Repairs or improvements made by, or under the authority of, officers who have general charge of highways, and power to lay them out, may show an acceptance of the dedication of a highway,<sup>31</sup> though repairs made by a merely sub-

Harrison County Sup'rs v. Seal, 66 Miss. 129; Point Pleasant Land Co. v. Cranmer, 40 N. J. Eq. 81.

<sup>27</sup> Archer v. Salinas City, 93 Cal. 43; Guthrie v. Town of New Haven, 31 Conn. 308; Wayne County v. Miller, 31 Mich. 447; Meier v. Portland Cable Ry. Co., 16 Or. 500; Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 58 Am. Rep. 143.

Such a presumption cannot, it seems, exist in the case of a highway, at least if it is opened, since there are liabilities to repair in connection with an opened highway. Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 58 Am. Rep. 143; Wayne County v. Miller, 31 Mich. 447. Compare Meier v. Portland Cable Ry. Co., 16 Or. 500.

<sup>28</sup> Town of Lake View v. Le Bahn, 120 Ill. 92; Osage City v. Larkin, 40 Kan. 206, 10 Am. St. Rep. 186; Village of Weeping Water v. Reed, 21 Neb. 261; Carter v. City of Portland, 4 Or. 339; Reid v. Board of Education of Edina, 73 Mo. 295.

<sup>29</sup> Littler v. City of Lincoln, 106 Ill. 353; Henderson's Trustee v. Fahey, 7 Ky. Law Rep. 290; Prescott v. Edwards, 117 Cal. 298; Grogan v. Town of Hayward (C. C.) 4 Fed. 161. See ante, § 389.

<sup>30</sup> Little Rock v. Wright, 58 Ark. 142; City of Eureka v. Armstrong, 83 Cal. 623; White v. Smith, 37 Mich. 291; State v. Ather-ton, 16 N. H. 203; State v. City of Elizabeth, 35 N. J. Law, 359.

<sup>31</sup> Town of Lake View v. Le Bahn, 120 Ill. 92; Town of Fowler

(977).

ordinate officer would not have such an effect.<sup>32</sup> A mere user by the public is sufficient, according to numerous decisions, to justify a finding that there was an acceptance of the dedication.<sup>33</sup> The question whether there has been an acceptance is, like that of the offer of dedication, usually one of fact for the jury.<sup>34</sup>

#### § 424. Effect of dedication.

At common law, a dedication for highway purposes does not affect the ownership of the land, but gives the public merely a right to use the land,<sup>35</sup> and such is *prima facie* the result of a dedication for a park, common, or square.<sup>36</sup> The

v. Linquist, 138 Ind. 566; Wright v. Tukey, 3 Cush. (Mass.) 290; Kaime v. Harty, 73 Mo. 316; Du Bois Cemetery Co. v. Griffin, 165 Pa. St. 81; Folsom v. Town of Underhill, 36 Vt. 580.

<sup>32</sup> State v. Bradbury, 40 Me. 154, 3 Gray's Cas. 810.

<sup>33</sup> Hall v. Kauffman, 106 Cal. 451; City of Denver v. Denver & S. F. Ry. Co., 17 Colo. 583; Green v. Elliott, 86 Ind. 53; City of Hartford v. New York & N. E. R. Co., 59 Conn. 250; Parsons v. Trustees of Atlanta University, 44 Ga. 529; Attorney General v. Tarr, 148 Mass. 309; Klenk v. Town of Walnut Lake, 51 Minn. 381; Holdane v. Village of Cold Spring, 21 N. Y. 474; State v. Borough of South Amboy, 57 N. J. Law, 252; Stewart v. Conley, 122 Ala. 179; Los Angeles Cemetery Ass'n v. City of Los Angeles (Cal.) 32 Pac. 240. But see Forbes v. Balenseifer, 74 Ill. 183; Gilder v. City of Brenham, 67 Tex. 345; White v. Bradley, 66 Me. 254; Morse v. Stocker, 1 Allen (Mass.) 150.

<sup>34</sup> City of Hartford v. New York & N. E. R. Co., 59 Conn. 250; Grube v. Nichols, 36 Ill. 92; Flack v. Village of Green Island, 122 N. Y. 107; Downend v. Kansas City, 71 Mo. App. 529; Folsom v. Town of Underhill, 36 Vt. 580.

<sup>35</sup> Wilder v. City of St. Paul, 12 Minn. 192 (Gil. 116); Charleston Rice Milling Co. v. Bennett, 18 S. C. 254; Indianapolis, B. & W. R. Co. v. Hartley, 67 Ill. 439; City of San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542. See ante, § 365.

<sup>36</sup> City of Cincinnati v. White's Lessee, 6 Pet. (U. S.) 431, 3 Gray's Cas. 799; Raleigh County Sup'rs v. Ellison, 8 W. Va. 308; Attorney General v. Abbott, 154 Mass. 323; Pomeroy v. Mills, 3 Vt. 279, 23 Am. Dec. 207.

statutes in regard to dedication by the recording of a plat frequently provide that the ownership of the land, and not a mere right of user, shall be vested in the public, or in the municipality in trust for the public.<sup>37</sup> Moreover, when land is dedicated for purposes which necessarily exclude the idea of its use by any and every individual, as in the case of a dedication for a school, or for charitable or religious uses, it would seem that, to make the dedication effective, exclusive rights of enjoyment equivalent to ownership must necessarily be vested in the corporation or association which carries out the purpose of the dedication.<sup>38</sup>

Whether the ownership or merely a right of user is vested in the public, the land cannot be aliened by the public authorities to individuals,<sup>39</sup> nor used for purposes other than those for which it was dedicated.<sup>40</sup>

A use of the land by the public authorities for purposes other than those contemplated in the dedication will be restrained upon the application of owners of other land in-

<sup>37</sup> See *City of Pella v. Scholte*, 21 Iowa, 463; *City of Winona v. Huff*, 11 Minn. 119 (Gil. 75); *Gebhardt v. Reeves*, 75 Ill. 301; *Village of Grandville v. Jenison*, 84 Mich. 54; *Incorporated Village of Fulton's Lessee v. Mehrenfeld*, 8 Ohio St. 440; *Elliott, Roads & S.* §§ 115, 149.

<sup>38</sup> See *Campbell v. City of Kansas*, 102 Mo. 326; *Hunter v. Trustees of Sandy Hill*, 6 Hill (N. Y.) 407.

<sup>39</sup> *City of Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 479; *Trustees of Augusta v. Perkins*, 3 B. Mon. (Ky.) 437; *Cummings v. City of St. Louis*, 90 Mo. 259; *Corporation of Seguin v. Ireland*, 58 Tex. 183.

<sup>40</sup> *Board of Regents for Normal School Dist. No. 3 v. Painter*, 102 Mo. 464; *Trustees of Methodist Episcopal Church of Hoboken v. City of Hoboken*, 33 N. J. Law, 13, 97 Am. Dec. 696; *Western Railway of Alabama v. Alabama G. T. R. Co.*, 96 Ala. 272; *Arkansas River Packet Co. v. Sorrels*, 50 Ark. 466; *Lutterloh v. Town of Cedar Keys*, 15 Fla. 306; *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540; *Church v. City of Portland*, 18 Or. 73; *Com. v. Rush*, 14 Pa. St. 186.



jured by such use,<sup>41</sup> and a suit for this purpose may be maintained by the dedicator, it seems, in case the ownership of the land is still in him,<sup>42</sup> but not if, under the statute, the ownership is in the public.<sup>43</sup>

In case a right of user only is vested in the public, an abandonment of such user has the effect of leaving the land free from the burden thereof, in the original dedicator or those claiming under him.<sup>44</sup> And when, under the statute, the ownership is vested in the public, if the authorities entirely relinquish the use of the land, or the use for which the land was dedicated becomes impossible, the land reverts to the original dedicator, or to persons claiming under him.<sup>45</sup> An improper use of the land by the public authorities is not, however, sufficient of itself to terminate the rights of the public therein, whatever be the character of such rights.<sup>46</sup>

<sup>41</sup> *Huber v. Gazley*, 18 Ohio, 18, 3 Ohio St. 399; *Corporation of Seguin v. Ireland*, 58 Tex. 183; *Strange v. Hill & W. D. S. Ry. Co.*, 54 Iowa, 669; *State v. Travis County*, 85 Tex. 435; *Church v. City of Portland*, 18 Or. 73; *Price v. Thompson*, 48 Mo. 363; *Lutterloh v. City of Cedar Keys*, 15 Fla. 306.

<sup>42</sup> *Hardy v. City of Memphis*, 10 Heisk. (Tenn.) 127.

<sup>43</sup> *United States v. Illinois Cent. R. Co.*, 154 U. S. 225. See *Williams v. Milwaukee Industrial Exposition Ass'n*, 79 Wis. 524. Contra, *Warren v. City of Lyons City*, 22 Iowa, 351.

<sup>44</sup> *Mahoning County Com'rs v. Young*, 8 C. C. A. 27, 59 Fed. 96; *Baltimore & O. R. Co. v. Gould*, 67 Md. 60; *Town of Freedom v. Norris*, 128 Ind. 377; *Benham v. Potter*, 52 Conn. 248; *Thomsen v. McCormick*, 136 Ill. 135; *Bayard v. Hargrove*, 45 Ga. 342. See ante, § 365.

<sup>45</sup> *Board of Education of the Incorporated Village of Van Wert v. Inhabitants of Village of Van Wert*, 18 Ohio St. 221, 98 Am. Dec. 114; *Kent County Sup'rs v. City of Grand Rapids*, 61 Mich. 144; *City of Newark v. Watson*, 56 N. J. Law, 667; *State v. Travis County*, 85 Tex. 435; *Heard v. City of Brooklyn*, 60 N. Y. 242; *Gebhardt v. Reeves*, 75 Ill. 301.

<sup>46</sup> *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498; *Williams v. First Presbyterian Soc. in Cincinnati*, 1 Ohio St. 478; *Hardy v. City of Memphis*, 10 Heisk. (Tenn.) 127.



## CHAPTER XXII.

### INTESTATE SUCCESSION.

- § 425. General considerations.
- 426. Descent to issue.
- 427. Surviving consort as heir.
- 428. Parent as heir.
- 429. Descent to collateral kindred.
- 430. Kindred of the half blood.
- 431. Representation.
- 432. Ancestral lands.
- 433. Illegitimate children.
- 434. Unborn children.
- 435. Advancements.

Upon the death of the owner of an estate of inheritance without leaving a will, it usually passes, subject to the rights of the surviving wife or husband, to persons designated by statute to take in such case by virtue of their relationship to the decedent, known as the latter's "heirs." An estate less than freehold passes, with other personal property, to the personal representative, to be distributed to the next of kin.

In this country, the children of an intestate, including any posthumous child, share his property equally, without reference to age and sex. An illegitimate child may usually, by force of statute, inherit from his mother, and from his father, if acknowledged by him.

If there are no children, the land passes to the parents, surviving consort, brothers and sisters, or other collateral kindred, the statutory provisions in this regard differing in the various states.

The statutes frequently provide that the children or descendants of a person who would have inherited in case he had sur-

vived the intestate shall have his share, by right of "representation."

Gifts made by the intestate, before his death, to one who subsequently becomes his heir, are, if so intended, treated as "advancements," and deducted from his share of the estate.

#### § 425. General considerations.

At common law, the real property belonging to decedents passed, in the absence of a valid will,<sup>1</sup> to persons standing in a position of blood relationship to them, according to certain established rules or "canons" of descent.<sup>2</sup> Personal property, on the other hand, including chattels real, passed to the administrator, appointed by the ecclesiastical court from among the intestate's next of kin, who usually, whether rightly or wrongly, appropriated to his own use all the surplus after payment of debts,<sup>3</sup> until by statute it was provided that such surplus should be distributed, in a certain manner, to the widow and children, or, in default of children, to the next of kin.<sup>4</sup>

In this country, the common-law distinction between real and personal property in this regard is still retained in a majority of states, though in some the executor is empowered, upon receiving authority from the court, to sell real property for the payment of debts.<sup>5</sup> In some states, however, the statute provides that real property shall pass to the personal representative, to be administered by him in the same manner as personal property,<sup>6</sup> and there is a growing

<sup>1</sup> But a will was valid, except by particular custom, only after the Statute of Wills. See ante, § 409.

<sup>2</sup> Litt. §§ 2-8; 2 Bl. Comm. 208 et seq.

<sup>3</sup> 2 Bl. Comm. 515; Holdsworth & V. Law of Succession, 132.

<sup>4</sup> 22 & 23 Car. II. c. 10.

<sup>5</sup> Post, § 462.

<sup>6</sup> 1 Woerner, Administration, §§ 276, 337; 1 Dembitz, Land Titles, § 28; 11 Am. & Eng. Enc. Law, 1037 et seq.

tendency to obliterate the distinctions between the two classes of property as regards the powers of the executor or administrator in regard thereto. Generally, moreover, in this country, the persons to whom the real property passes upon the death of the owner intestate are approximately the same as those entitled to the personal property when distributed by the personal representative.

At common law, the right of succession to real property on the death of the owner was determined by the relationship of the claimant to the person who last died seised in deed of the land.<sup>7</sup> This rule has been changed in England by a statutory provision that descent shall be traced from the last purchaser of the land,<sup>8</sup> while in this country, in most, if not all, the states, descent is traced from the person last entitled to the land, regardless of whether he was seised, or whether he obtained the land by purchase or descent.<sup>9</sup>

At common law, as in England at the present day, the male issue inherits before the female, and, when there are two or more males of equal degree, the elder alone inherits, while females inherit all together. These rules, in so far

<sup>7</sup> Litt. § 8; 2 Bl. Comm. 209.

This common-law rule that seisin in deed makes the root of descent, in connection with the rule that persons of the half blood could not inherit, received what was regarded as its typical exemplification in the following case: If, on the death of a father seised in fee simple, leaving a son and a daughter by a first marriage, and a son by a second marriage, the elder son, the heir, entered and obtained seisin, and then died without issue, his half brother could not inherit, but the land passed to the sister, while, if he did not enter, the land would pass to the half brother. Hence the maxim, "*Possessio fratris de feodo simplici facit sororem esse haeredem*," and the rule that seisin in deed is necessary to make the root of descent was frequently referred to as the doctrine of "*possessio fratris*." See Litt. § 8; Williams, Seisin, 55; Challis, Real Prop. 187.

<sup>8</sup> 3 & 4 Wm. IV. c. 106, "The Inheritance Act."

<sup>9</sup> 4 Kent's Comm. 388; 1 Dembitz, Land Titles, § 30.

as they give priority to the male issue, and to the eldest of such issue, have been changed in all the states of this country, and all those in the same degree of relationship, whether male or female, share equally in the inheritance, the legislation in this country having followed in this respect, as it has frequently done in other respects, the provisions of the English statute as to the distribution of personal property.<sup>10</sup>

#### § 426. Descent to issue.

In all the states, realty descends to all the legitimate children of deceased living at his death, and to the descendants of deceased children, these latter taking *per stirpes*, and not *per capita*,—that is, the descendants of each child taking what their ancestor would have taken had he been alive, without reference to their number.<sup>11</sup> In case all the children of the intestate are dead, the grandchildren and issue of deceased grandchildren inherit in their place. Such descendants take *per stirpes* if they are not all in the same degree of relationship to the intestate, as when some are grandchildren and some are great-grandchildren, while, if they are all in the same degree of relationship, they take in some states *per capita*, though in other states *per stirpes*.<sup>12</sup>

#### § 427. Surviving consort as heir.

At common law, the surviving husband was entitled to an estate by curtesy in his wife's real property,<sup>13</sup> while he took an absolute interest in her personal property, including chat-

<sup>10</sup> 4 Kent's Comm. 379; 1 Stimson's Am. St. Law, § 3101 et seq. Occasionally a naked legal title still descends as at common law. As to estates tail, see ante, § 29.

<sup>11</sup> 1 Stimson's Am. St. Law, § 3101.

<sup>12</sup> 1 Stimson's Am. St. Law, §§ 3103, 3137; 1 Dembitz, Land Titles, § 33.

<sup>13</sup> Ante, §§ 204-211.

tels real.<sup>14</sup> Apart from his estate by curtesy, her real property did not pass to him, even though otherwise it escheated for failure of heirs. In this country, at the present day, the surviving husband is frequently given a fee-simple interest in his wife's real property. In some, he is, if the wife leaves no issue, given a fee-simple interest in all her realty, while in some he is given one-half or two-thirds of her realty in such case. In a number of states, although there are children, he takes a share by descent, which is greater or less, according to the number of children who are to share in the intestate's property. In some states, moreover, he takes all the realty, if the wife leaves no issue, parent, nor brother or sister, and in most, if not in all, the states, he takes it if she leaves no kindred.<sup>15</sup>

The surviving wife had, at common law, her right of dower only out of his realty, while, by the English statute of distribution, she was given one-third of his personalty, unless he left no issue, in which case she had one-half.<sup>16</sup> In this country the widow is frequently, by statute, given a fee-simple interest in a portion of her husband's realty in certain contingencies, as when he leaves no issue, or no issue, parent, or brother or sister, or when he leaves no kindred, her rights corresponding, in a general way, to those of a surviving husband.<sup>17</sup> In a number of states, moreover, she is given a third or a half in fee simple, even though her husband leaves issue,<sup>18</sup> and this she is frequently allowed to take in lieu of any provisions made for her in his will.<sup>19</sup>

<sup>14</sup> Co. Litt. 351; 2 Bl. Comm. 434.

<sup>15</sup> 1 Stimson's Am. St. Law, §§ 3105, 3109, 3115, 3119, 3123; 1 Woerner, Administration, § 66; 1 Dembitz, Land Titles, § 32.

<sup>16</sup> 2 Bl. Comm. 515.

<sup>17</sup> 1 Stimson's Am. St. Law, §§ 3109, 3115, 3119, 3123; 1 Woerner, Administration, § 67; 1 Dembitz, Land Titles, § 32.

<sup>18</sup> 1 Stimson's Am. St. Law, § 3105.

<sup>19</sup> 1 Stimson's Am. St. Law, § 3262.



**§ 428. Parent as heir.**

At common law, land could never lineally ascend,—that is, it could not pass to the father or grandfather of the decedent upon the latter's death, though it could pass to his uncle, the brother of his father, and might from him pass to the father.<sup>20</sup> This rule has been entirely changed in this country, and the statute frequently provides that the decedent's property shall pass to his father or mother in certain cases. Thus, in some states it is provided that, if the intestate leave no descendants, his property shall pass to his father, or to the father or mother, or to the mother, together with brothers and sisters, though in some states the brothers and sisters of deceased are preferred to either of his parents.<sup>21</sup>

**§ 429. Descent to collateral kindred.**

In case the intestate leaves no issue surviving, and the realty does not pass entirely to the surviving consort, or to one or both of the parents, under the statutes referred to above, it descends among the collateral kindred of the intestate,—that is, to persons not lineally related to him, but related by reason of the fact that they are descended from the same ancestor. Among such collateral kindred the brothers and sisters and their descendants hold the first place, and are sometimes, by the terms of the statute, preferred to the parents of deceased.<sup>22</sup>

As between other collateral kindred not particularly specified in the statute of descent, those standing in an equal degree of relationship to the intestate share the inheritance to the

<sup>20</sup> Litt. § 3. Different explanations of the origin of this rule have been given. See 2 Bl. Comm. 211 et seq.; 2 Pollock & Maitland, Hist. Eng. Law, 287 et seq.; Holdsworth & Vickers, Law of Succession, 152.

<sup>21</sup> 1 Stimson's Am. St. Law, §§ 3107, 3111, 3117; 1 Woerner, Administration, § 68.

<sup>22</sup> 1 Stimson's Am. St. Law, §§ 3107, 3111, 3113, 3121.

exclusion of those in a more distant degree. In calculating the degrees of relationship for this purpose, the common law adopted the rule that the intestate and a particular claimant were to be regarded as in the degree of relationship to one another which corresponded to the number of degrees between their common ancestor and the one of his two descendants who was most distant from him. So, if the claimant and intestate were both grandchildren of the common ancestor, they were regarded as related to one another in the second degree, while, if one was a grandchild and the other a great-grandchild, they were related in the third degree. By the civil-law method of computing relationship, on the other hand, the degrees between the common ancestor and the intestate are added to those between the former and the claimant, in order to ascertain the degree of relationship; and so two grandchildren of a common ancestor are related in the fourth degree, and a grandchild and a great-grandchild in the fifth degree.<sup>23</sup>

In this country, in the majority of the states, the statute provides that the degrees of kindred shall be computed according to the rule of the civil law, though, in a few, that of the common law is adopted.<sup>24</sup> The preference shown for the civil law is in accord with the general tendency to follow the English statute of distributions, which was construed with reference to the civil-law rule.<sup>25</sup>

#### § 430. Kindred of the half blood.

At common law, in order that one might inherit as a collateral kinsman of the intestate, it was necessary that they

<sup>23</sup> 2 Bl. Comm. 206 et seq.

<sup>24</sup> 1 Stimson's Am. St. Law, §§ 3121, 3139; 1 Woerner, Administration, § 72.

<sup>25</sup> See 2 Bl. Comm. 516, and Christian's note; *Lloyd v. Tench*, 2 Ves. Sr. 212.

both be descended not only from the same person, but from the same marriage of that person,—that is, the claimant must have been a kinsman of the whole, and not of the half, blood. So, one could not inherit from his half brother, even though the land had descended from their common parent to such half brother, and though otherwise the land would escheat for want of heirs.<sup>26</sup> This rule has been changed by statute in most, if not all, the states, but the statutory provisions on the subject are very divergent. In a few states, kindred of the half blood have the same rights of succession as those of the whole blood; and in some they inherit half shares only as against the whole shares passing to those of the whole blood. In a number of states, while the distinction between the whole and half blood no longer exists in connection with land purchased by the intestate, it does exist as to ancestral land, so as to exclude from any share therein collateral kin not of the blood of the ancestor from whom the land was derived. In a few states the half blood does not take except in default of kindred of the whole blood in the same degree of relationship.<sup>27</sup>

### § 431. Representation.

The statutes frequently provide that the descendants of a person deceased shall inherit the share which would have passed to such person had he survived the intestate, the descendants being then said to take “by representation.” Since the statutes expressly give the right of succession to the direct descendants of the intestate, and declare whether they are to take *per stirpes* or *per capita*, the application of the principle of representation is not usually called for in their favor. As regards collateral kindred, there is in some states

<sup>26</sup> Litt. §§ 6-8; 2 Bl. Comm. 227.

<sup>27</sup> 1 Stimson's Am. St. Law, § 3133; 1 Woerner, Administration, § 70; 1 Dembitz, Land Titles, § 37.

a general provision that any descendants of one deceased shall take the share which such person would have taken, but, more usually, the right of representation among collaterals is restricted to the descendants of a deceased brother or sister of the intestate, who are thus given the right to stand in the place of the former as regards the inheritance, and share the property of the intestate with any surviving brothers and sisters or descendants of other deceased brothers and sisters. Thus, if the intestate left surviving a brother, and the grandchildren of a deceased sister, though such grandchildren could not otherwise assert any right to share the intestate's property with the surviving brother, since he stands in a closer degree of relationship to the intestate, they can do so by reason of their right of representation. In some states, however, the right of representation is not conceded to all descendants of a deceased brother or sister, but is restricted to the children of such brother or sister, the result of which would be, in the case stated above, that the surviving brother would take all the intestate's property, to the exclusion of the grandchildren of the deceased brother, though the children of the deceased brother would have been entitled.<sup>28</sup> The statutes allowing representation have no application, it seems, except for the purpose of entitling to a share of the inheritance a person or persons who would otherwise take nothing, owing to the existence of persons more closely related to the intestate, and so the descendants of deceased brothers and sisters of intestate, if all in the same generation, take not by representation, but directly as heirs. When the descendants of one deceased take by representation, however many there be of them, they can, all together, take only the share which their ancestor would have taken,—that is, they take *per stirpes*, although, if they had taken in

<sup>28</sup> 1 Stimson's Am. St. Law, §§ 3103, 3138; 1 Woerner, Administration, § 71; 1 Dembitz, Land Titles, § 35.

their own right, and not by representation, they would have taken *per capita*.

### § 432. Ancestral lands.

At common law, in case of failure of lineal descendants of the person last seised, the land passed to his collateral relations, provided only they were of the blood of the first purchaser, by whom the land was brought into the family.<sup>29</sup> This rule of the common law survives to some extent in the statutory provisions, found in a number of states, to the effect that, if the land came to the intestate otherwise than by purchase, or, in some states, if it came to him either by descent or by gift or devise from an ancestor, it shall pass, not to his kindred generally, but only to such kindred as are of the blood of the ancestor from whom it was derived by him.<sup>30</sup> Of the same nature is the provision found in many states that, upon the death of a minor unmarried, leaving property inherited from either parent, it shall go to the other children of the same parent.<sup>31</sup> The word "ancestor," used to describe the person from whom the land must have come in order to be within the operation of the provision, refers to any person, whether lineally or collaterally related to the intestate, from whom the land might pass to the latter under the laws of descent, and from whom the land did in fact actually pass directly to the intestate.<sup>32</sup>

### § 433. Illegitimate children.

At common law, a child born out of wedlock was regarded as *filius nullius*, and as consequently bearing no relationship

<sup>29</sup> Litt. § 4; 2 Bl. Comm. § 220.

<sup>30</sup> 1 Stimson's Am. St. Law, § 3107.

<sup>31</sup> 1 Dembitz, Land Titles, § 36; 1 Stimson's Am. St. Law, § 3101.

<sup>32</sup> *Buckingham v. Jacques*, 37 Conn. 402; *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Prickett's Lessee v. Parker*, 3 Ohio St. 394; *Brower v. Hunt*, 18 Ohio St. 311; *Morris v. Potter*, 10 R. I. 58.



to any persons other than his own offspring. Consequently he could be the heir neither of his own father or mother, nor of any other person, and no persons could inherit from him except the heirs of his body.<sup>33</sup> This rule has been changed generally in this country by various statutory provisions. In the first place, the state statute frequently provides that the intermarriage of the parents after the birth of the child, or such intermarriage when accompanied by the father's acknowledgment of the child, shall render the child legitimate, and in some states the acknowledgment by the father without intermarriage has this effect. In some states the statute provides, however, that an acknowledgment of the child shall not enable the child to inherit from the kindred of the father.<sup>34</sup>

In most states, by statute, the illegitimate children inherit from the mother equally with the legitimate children, and in some states they inherit also from her kindred, though in a majority of the states, while inheriting from the mother, they do not inherit from her kindred. In a few states they inherit from the mother only in case of default of lawful issue.<sup>35</sup> The property of an illegitimate child will descend to the surviving husband or wife, or to the children, as in the case of any other person dying intestate. In default of such others entitled to inherit, the decedent's property goes usually, under the statute, to his mother and her kindred.<sup>36</sup>

#### § 434. Unborn children.

At common law, a child *en ventre sa mere* at the time of

<sup>33</sup> 1 Bl. Comm. 459; 2 Kent's Comm. 212.

<sup>34</sup> 1 Stimson's Am. St. Law, §§ 6631, 6632.

<sup>35</sup> 1 Stimson's Am. St. Law, § 3151; 1 Woerner, Administration, § 75.

<sup>36</sup> 1 Stimson's Am. St. Law, § 3154; 1 Woerner, Administration, § 75.

the death of the intestate is regarded as living for the purpose of taking from him by descent.<sup>37</sup> This rule is confirmed by statute in many states, but in some the statute applies only to a child of the intestate born after his death, and, in others, only to posthumous children descended from him.<sup>38</sup>

### § 435. Advancements.

An advancement is a giving, by anticipation, to a child or other relative, of a part or the whole of what the donee would receive on the death of the donor intestate, with the result, generally speaking, that the amount thereof is deducted in determining the share of such donee after the donor's death. This doctrine of advancements is based exclusively on statutes, and these differ very considerably in the different states. In some states the statute applies only in the case of an advancement to a child or children of the intestate, so that a gift to a grandchild would not be charged against him as an advancement. In some states a gift to any descendant of the intestate is regarded as an advancement to him, for the purpose of determining his share of the inheritance, and in a number of states a gift to a child or other descendant is, in case such child or descendant dies before the donor, charged against the share which he would have taken, and so deducted from the share taken by his children or descendants. In a few states a gift to any possible heir is regarded as an advancement in case the donee turns out to be the actual heir.<sup>39</sup>

<sup>37</sup> 4 Kent's Comm. 412; Challis, Real Prop. 111; Doe d. Clarke v. Clarke, 2 H. Bl. 399.

<sup>38</sup> 1 Stimson's Am. St. Law, §§ 2844, 3135, 3136; 1 Woerner, Administration, § 74.

<sup>39</sup> 1 Stimson's Am. St. Law, §§ 3163, 3164, 3168; 2 Woerner, Administration, § 559.

The question whether a gift to a possible heir or distributee is to be regarded as an advancement is a question as to the intention of the donor, and, apart from statute, a gift to an adult child, if of substantial value, is usually presumed to be an advancement.<sup>40</sup> In a number of states there are statutory provisions to the effect that the gift, in order to constitute an advancement, must be acknowledged in writing as an advancement by the donee, or must be expressed in the gift or grant to be made as such, or must be so charged by the donor in writing.<sup>41</sup> In some states it is provided that maintaining, educating, or giving money to a minor child, without any view to a portion or settlement for life, is not an advancement.<sup>42</sup> The statute in many states declares that, if the amount of the advancement exceeds the share to which the donee would be entitled on the death of the donor intestate, though he need refund no part of what he has received, he can receive nothing further from the intestate's estate. In case the advancement is not equal to the share to which he is entitled, the donee, in a number of states, is given so much of the intestate's property as will make all the shares equal; and in some states it is provided that the advancement is to be charged against the share to which the donee is entitled in either the real or the personal property, according as the advancement may have been the one or the other, and that, if the advancement would exceed the amount to which he may be entitled out of either class of property, his share in the other class shall be proportionally reduced. In some states it is provided in terms that the donee must, in order to obtain his proper share in the intestate's property, bring the amount of the advancement into "hotch pot,"—

<sup>40</sup> 1 Woerner, Administration, § 555.

<sup>41</sup> 1 Stimson's Am. St. Law, § 3162.

<sup>42</sup> 1 Stimson's Am. St. Law, § 3161.

that is, he must contribute to the common fund the amount of his advancement, and shall then receive therefrom the same amount as if the advancement had not been made.<sup>43</sup>

The statutes in regard to advancements have no application, as a general rule, in the case of a partial intestacy, since it is presumed that the will would have mentioned any gifts which it was intended should be regarded as advancements.<sup>44</sup>

<sup>43</sup> 1 Stimson's Am. St. Law, § 3163.

<sup>44</sup> 1 Woerner, Administration, § 553; 1 Dembitz, Land Titles, § 248.

## CHAPTER XXIII.

### ADVERSE POSSESSION OF LAND.

- § 436. General considerations.
- 437. Duration and continuity of possession.
- 438. Tacking.
- 439. Personal disabilities.
- 440. Exception in favor of the sovereign.
- 441. Actual and visible possession.
- 442. Exclusiveness of possession.
- 443. Hostile character of possession.
- 444. Extent of possession.

By the adverse possession of land belonging to another, for the period prescribed by statute for the bringing of an action to recover land, not only the right to bring such action is barred, but the person in possession is usually regarded as acquiring the ownership of the land in fee simple.

The adverse possession must be continuous and uninterrupted for the statutory period, but it need not be by the same person during all that period, it being sufficient that there be a privity between the persons successively in possession.

If the owner of the land is under a disability at the time of the beginning of the adverse possession, so as to be unable to sue on account thereof, he is, by the statute, given a certain period after the expiration of the disability for the bringing of an action against the person in possession. The statutory period, moreover, does not, in the absence of a specific provision to the contrary, run in favor of a person in possession of land belonging to the sovereign.

The possession, in order to have the effect of barring the right of action, or of transferring the ownership, must be actual, visible, and exclusive, and must be hostile to the owner,



—that is, it must be under a claim of right, and such as to exclude any recognition of the rights of the true owner.

One in adverse possession of part of a tract of land, to all of which he has color of title, is regarded as in constructive possession of the whole tract, as against the owner who is not in possession of any part thereof.

### § 436. General considerations.

There were, even in early times, numerous statutes adopted in England limiting the time within which an action could be brought on account of a disseisin of land, but these differed from the statutes of the present day in that, instead of naming a certain number of years before the institution of the action beyond which no disseisin could be alleged, they named a certain year back of which the pleader could not go.<sup>1</sup> The last statute which adopted this method of fixing the period of limitation was St. Westminster I. c. 39,<sup>2</sup> which forbade the seisin of an ancestor to be alleged in a writ of right prior to the beginning of the reign of Richard I. (A. D. 1189), and for other writs fixed the year 1217. Thus, under this statute, at the time of its passage, the period of limitation for some writs was fifty-eight years, and this period was lengthened, as time went on without any change in the law, so that it exceeded three hundred years when, by 32 Hen. VIII. c. 2,<sup>3</sup> a change was made, and the modern method was adopted of fixing a certain number of years with-

<sup>1</sup> Thus the earliest date at which the seisin of an ancestor could be alleged in a writ of right was the beginning of the reign of Henry I. (A. D. 1100), until this was changed by the Statute of Merton to the beginning of the reign of Henry II. (A. D. 1154). Other dates were fixed for other writs.

<sup>2</sup> 3 Edw. I. (A. D. 1275).

<sup>3</sup> A. D. 1540. The disadvantages of the long period of limitation was, however, to a great extent avoided by the system of levying fines. See Lightwood, *Possession of Land*, 156.

in which the action must be brought. This last statute, however, applied only to the old real actions, and, the action of ejectment having to a great extent taken their place, St. 21 Jac. I. c. 16,<sup>4</sup> was passed, which provided that no person should thereafter make any entry into any lands, tenements, or hereditaments but within twenty years next after his or their right or title shall have accrued. This statute, while not in terms applying to the action of ejectment, did so in effect by barring the right of entry on which the action depended. This statute of James I. is that on which the statutes in this country are more or less modeled. It has been superseded in England by later statutes, which tend to bar an action to recover land after the statutory period has elapsed without reference to the character of the possession of the defendant in the action.<sup>5</sup> In that country the problem is much simplified, however, by the absence of wild and unsettled lands. In this country, many perplexing and difficult questions have arisen under the statutes as to the character of the possession of the land which one must have for the statutory period in order that the rights of the original owner may be barred. A possession for the statutory period which is sufficient to bar an action to recover the land is known as "adverse possession," and one who thus acquires rights in the land as against the former owner is said to acquire title by "adverse possession."

While occasionally the state statutes may expressly provide that a failure to re-enter or bring an action to recover the land within the statutory period shall operate to transfer the title to the person in possession, they almost invariably in terms bar the remedy merely. They have, however, with but few, if any, exceptions, been construed as operating to

<sup>4</sup> A. D. 1623.

<sup>5</sup> 3 & 4 Wm. IV. c. 27; 37 & 38 Vict. c. 57,—“Real Property Limitation Acts” of 1833 and 1874.

transfer the title to the wrongful possessor, enabling him to assert his ownership in an action of ejectment or otherwise against the whole world,<sup>6</sup> including the original owner,<sup>7</sup> and as rendering necessary a legal conveyance in order to revest the ownership in the latter, after the lapse of the statutory period.<sup>8</sup>

The adverse possession which is required in order to divest the title of the true owner, under the construction placed upon the Statute of James as well as upon the state statutes, corresponds in a general way to disseisin at the common law. It may, however, occasionally exist under circumstances which would not have given rise to a disseisin, and the use of the latter term, as well as of the correlative expressions "disseisor" and "disseisee," while permissible and highly convenient, is not always absolutely accurate according to the old law.

#### § 437. Duration and continuity of possession.

The Statute of James barred the right of entry at the end of twenty years after the right or title accrued, and this

<sup>6</sup> *Baker v. Oakwood*, 123 N. Y. 16, *Finch's Cas.* 1053; *Hughes v. Graves*, 39 Vt. 359, 3 *Gray's Cas.* 40; *Harpending v. Reformed Protestant Dutch Church of New York City*, 16 Pet. (U. S.) 455; *Sherman v. Kane*, 86 N. Y. 57; *Armstrong v. Risteau's Lessee*, 5 Md. 256, 59 Am. Dec. 115; *Schock v. Falls City*, 31 Neb. 599; *Jacks v. Chaffin*, 34 Ark. 534; *Mitchell v. Campbell*, 19 Or. 198; *Gulf, C. & S. F. Ry. Co. v. Cusenberry*, 86 Tex. 529; *McDuffee v. Sinnott*, 119 Ill. 449; *Sutton v. Pollard*, 96 Ky. 640; *Way v. Hooton*, 156 Pa. St. 8.

<sup>7</sup> *Sharon v. Tucker*, 144 U. S. 533; *Armstrong v. Risteau's Lessee*, 5 Md. 256, 59 Am. Dec. 115; *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205; *Barnes v. Light*, 116 N. Y. 34; *Hall v. Hall*, 27 W. Va. 468, 480.

<sup>8</sup> *Inhabitants of School Dist. No. 4, in Winthrop, v. Benson*, 31 Me. 381, 3 *Gray's Cas.* 38, *Finch's Cas.* 1059; *Riggs v. Riley*, 113 Ind. 208; *Allen v. Mansfield*, 82 Mo. 688; *Bell v. Adams*, 81 N. C. 118; *Bruce v. Washington*, 80 Tex. 368; *Todd v. Kauffman*, 8 Mackey (D. C.) 304.

period has been adopted in a number of the states of this country, while in a few a greater period is required to bar the right of action, and in some a much less period.<sup>9</sup>

In a number of the states there are statutory provisions for what are known as "short limitations," in effect considerably reducing the ordinary period in cases when the adverse possession is by one claiming under "color of title,"—that is, by one who has, in taking possession, acted on the strength of a conveyance or judicial decree purporting to vest the title in him, but which, for some reason, fails to do so. In some states, such a provision exists in favor of one occupying under a particular class of conveyance or decree, as when it is provided that a junior patent from the state under which one occupies cannot be attacked after a certain number of years, and such a provision is frequently found in favor of a purchaser at certain classes of judicial sales, or at tax sales. The possession under such a "short limitation" act is usually required to be accompanied by the payment of taxes on the land by the person in possession.<sup>10</sup>

The adverse possession must continue without interruption for the statutory period, and, if an interruption occurs, and possession is thereafter resumed, the limitation period commences to run only from the time of such resumption.<sup>11</sup> The interruption of continuity may result from the cessation by the person in possession of his exercise of acts of possession or ownership over the land,<sup>12</sup> but the mere fact that

<sup>9</sup> See Wood, Limitations, § 254.

<sup>10</sup> The "short limitation" acts of the several states are well summarized in 2 Dembitz, Land Titles, § 186.

<sup>11</sup> *Steeple v. Downing*, 60 Ind. 478; *Ross v. Goodwin*, 88 Ala. 390; *Armstrong v. Ristean's Lessee*, 5 Md. 256, 59 Am. Dec. 115; *Old South Soc. v. Wainwright*, 156 Mass. 115; *Bliss v. Johnson*, 94 N. Y. 235.

<sup>12</sup> *Downing v. Mayes*, 153 Ill. 330, 46 Am. St. Rep. 896; *Stephens v. Leach*, 19 Pa. St. 262; *Nixon v. Porter*, 38 Miss. 401; *Sharp v.*

the acts of possession are not continuous, or that the owner does not continue in actual occupancy, does not necessarily show an interruption of the possession, this depending on the character of the acts necessary to constitute actual possession, and the circumstances of the particular case.<sup>13</sup>

A recognition of the true owner's right to possession is sufficient to break the continuity of the possession.<sup>14</sup> The adverse possession is also interrupted if the owner enters on the land, provided this is done openly and under claim of right, with a clearly asserted purpose of taking possession,<sup>15</sup> as it is by the enforcement of or submission to a judgment in an action of ejectment brought by the owner, though a mere recovery in ejectment, without any action with reference thereto, does not have such an effect.<sup>16</sup>

### § 438. Tacking.

The question quite frequently arises whether one who has not been in possession of the land for the statutory period

Johnson, 22 Ark. 79; Barrell v. Title Guarantee & Trust Co., 27 Or. 79.

<sup>13</sup> Hughs v. Pickering, 14 Pa. St. 297, Finch's Cas. 1040; Downing v. Mayes, 153 Ill. 330, 46 Am. St. Rep. 896; Ford v. Wilson, 35 Miss. 490, 72 Am. Dec. 137; Crispen v. Hannavan, 50 Mo. 536.

<sup>14</sup> Nebraska Ry. Co. v. Culver, 35 Neb. 143; City of St. Paul v. Chicago, M. & St. P. Ry. Co., 63 Minn. 330; Lovell v. Frost, 44 Cal. 471; Litchfield v. Sewell, 97 Iowa, 247; Ingersoll v. Lewis, 11 Pa. St. 212, 51 Am. Dec. 536; Williams v. Scott, 122 N. C. 545; Warren v. Bowdran, 156 Mass. 280.

<sup>15</sup> Burrows v. Gallup, 32 Conn. 493, 87 Am. Dec. 186; Bowen v. Guild, 130 Mass. 121, 3 Gray's Cas. 86; Altemas v. Campbell, 9 Watts (Pa.) 28, 34 Am. Dec. 494; Musser-Sauntry Land, Logging & Mfg. Co. v. Tozer, 56 Minn. 443; Evitts v. Roth, 61 Tex. 81; Campbell v. Wallace, 12 N. H. 362, 37 Am. Dec. 219.

<sup>16</sup> Moore v. Greene, 19 How. (U. S.) 69; Smith v. Hornback, 4 Litt. (Ky.) 232, 14 Am. Dec. 122; Bishop v. Truett, 85 Ala. 376; McGrath v. Wallace, 85 Cal. 622; Gould v. Carr, 33 Fla. 523; Forbes v. Caldwell, 39 Kan. 14; Mabary v. Dollarhide, 98 Mo. 198, 14 Am. St. Rep. 639.



may add or "tack" to his possession that of another person, previously in possession, in order to make up such period, or, in other words, whether recovery of the land by the original owner is prevented by adverse possession for the statutory period, irrespective of whether this adverse possession was by one person for the whole period, or by different persons in succession. That an heir is entitled to tack his ancestor's possession to his own is generally conceded,<sup>17</sup> and the great weight of authority is to the effect that one in adverse possession can transfer his rights, such as they are, to another, by a conveyance of the land, or otherwise, so as to enable such other to tack his predecessor's possession to his own,<sup>18</sup> though there are a few decisions to the effect that the disseisor has no rights thus capable of voluntary transfer.<sup>19</sup> Even a purchaser at execution sale has been allowed to tack the possession of the execution defendant.<sup>20</sup> A merely oral transfer of the previous predecessor's rights is usually regarded as sufficient.<sup>21</sup> It is necessary, however, that there be a trans-

<sup>17</sup> *McNeely v. Langan*, 22 Ohio St. 32, 3 Gray's Cas. 124; *Overfield v. Christie*, 7 Serg. & R. (Pa.) 173, 3 Gray's Cas. 117; *Williams v. McAiley*, Cheves (S. C.) 200; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241, 3 Gray's Cas. 121; *Fugate v. Pierce*, 49 Mo. 441; *Rowland v. Williams*, 23 Or. 515.

<sup>18</sup> *Overfield v. Christie*, 7 Serg. & R. (Pa.) 173, 3 Gray's Cas. 117; *McNeely v. Langan*, 22 Ohio St. 32, 3 Gray's Cas. 124; *Gage v. Gage*, 30 N. H. 420; *Frost v. Courtis*, 172 Mass. 401. And see cases cited post, note 21.

<sup>19</sup> *Potts v. Gilbert*, 3 Wash. C. C. 475, Fed. Cas. No. 11,347, 3 Gray's Cas. 115; *King v. Smith*, Rice (S. C.) 10; *Garrett v. Weinberg*, 48 S. C. 28.

<sup>20</sup> *Hall v. Hall*, 27 W. Va. 468; *Miller v. Bumgardner*, 109 N. C. 412. See *Doe d. Hester v. Coats*, 22 Ga. 56.

<sup>21</sup> *Hughs v. Pickering*, 14 Pa. St. 297, Finch's Cas. 1040; *McNeely v. Langan*, 22 Ohio St. 32, 3 Gray's Cas. 125; *Faloon v. Simshauser*, 130 Ill. 649; *Davock v. Nealon*, 58 N. J. Law, 21; *Crispen v. Hannavan*, 50 Mo. 536; *Sherin v. Brackett*, 36 Minn. 152; *Com. v. Gibson*, 85 Ky. 666; *Illinois Steel Co. v. Budzisz*, 106 Wis. 499; *Rowland v. Williams*, 23 Or. 515. But see *Sawyer v. Kendall*, 10 Cush.

fer or some sort of contractual connection between the respective possessions in order that they may be tacked, and one who disseises another who is already in adverse possession cannot tack the former's possession to his own.<sup>22</sup> There can, of course, be no tacking if the possession of one person does not immediately follow upon that of the other, since in that case the element of continuity is absent.<sup>23</sup>

It has been held that one claiming as remainderman under a will may tack to his own possession the possession of the testator and the life tenant under the will, since the possession of each is under the same title.<sup>24</sup> The possession of the widow of the owner has been regarded as not so connected with that of the latter as to entitle her to tack his possession to her own after his death.<sup>25</sup> Under statutes, however, by which she is given certain rights of possession even before the assignment of dower, their possessions may be tacked.<sup>26</sup>

(Mass.) 241, 3 Gray's Cas. 121; *Ward v. Bartholomew*, 6 Pick. (Mass.) 409.

<sup>22</sup> *Sherin v. Brackett*, 36 Minn. 152, Finch's Cas. 1007; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241, 3 Gray's Cas. 121; *Lucy v. Tennessee & C. R. Co.*, 92 Ala. 246; *Locke v. Whitney*, 63 N. H. 597; *Smith v. Chapin*, 31 Conn. 531; *City & County of San Francisco v. Fulde*, 37 Cal. 349, 99 Am. Dec. 278; *Crispen v. Hannavan*, 50 Mo. 536; *Heflin v. Burns*, 70 Tex. 347; *Jarrett v. Stevens*, 36 W. Va. 445; *Low v. Schaffer*, 24 Or. 239; *Erck v. Church*, 87 Tenn. 580. But see *Scales v. Cockrill*, 3 Head (Tenn.) 432; *Davis v. McArthur*, 78 N. C. 357.

<sup>23</sup> See *Winslow v. Newell*, 19 Vt. 164; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Louisville & N. R. Co. v. Philyaw*, 88 Ala. 264; *Warren v. Frederichs*, 76 Tex. 647; *Turner v. Baker*, 64 Mo. 218, 27 Am. Rep. 226. See, also, *Hughs v. Pickering*, 14 Pa. St. 297, Finch's Cas. 1040.

<sup>24</sup> *Haynes v. Boardman*, 119 Mass. 414, Finch's Cas. 1042. Contra, *Austin v. Rutland R. Co.*, 45 Vt. 215.

<sup>25</sup> *Sawyer v. Kendall*, 10 Cush. (Mass.) 241, 3 Gray's Cas. 121; *Robinson v. Allison*, 124 Ala. 325. But see *Mills' Heirs v. Bodley*, 4 T. B. Mon. (Ky.) 248; *Hickman v. Link*, 97 Mo. 482.

<sup>26</sup> *McEntire v. Brown*, 28 Ind. 347.

**§ 439. Personal disabilities.**

The statute of limitations invariably extends the period for bringing an action to recover land in case the plaintiff was under disability at the time the right of action accrued. The Statute of James I. contained such an exception in favor of (1) persons under twenty-one years, (2) *femes covert*, (3) persons *non compos mentis*, (4) persons imprisoned, and (5) persons "beyond the seas."

The saving clause in favor of infants is retained in most, if not all, of the state statutes, though the time at which infancy ceases differs in different states. The saving in favor of married women also still exists in the majority of states, though in some it has been expressly abolished, in view of legislation enabling a married woman to sue alone. The saving in favor of persons *non compos mentis* is usually retained, and those in favor of persons imprisoned and of persons "beyond the seas," or, what is regarded as equivalent, "absent from the United States," are also frequently to be found. In some states, moreover, there are exceptions in favor of alien enemies. The statutes differ greatly as to the extent of time after the removal of the disability within which an action may be brought, some naming the full period of limitation, and others naming a much shorter period.<sup>27</sup>

These exceptions in statutes limiting the time for the recovery of land, as well as in those applicable to personal actions only, are usually construed as applicable only to a disability existing at the time of the accrual of the right of action, and the fact that a disability in the owner to sue arises after such accrual does not affect the running of the statute.<sup>28</sup>

<sup>27</sup> The statutory provisions as to disabilities are summarized in Wood, *Limitations* (3d Ed.) § 237.

<sup>28</sup> *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 476, *Finch's Cas.* 1047; *Doe d. Caldwell v. Thorp*, 8 Ala. 253; *Currier v. Gale*, 3 Allen (Mass.) 328; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235.

Accordingly, if the right of action has once existed in favor of a person, the fact that it passes by descent to one under the disability of infancy does not extend the time for bringing suit.<sup>29</sup> And if a disability existing at the time of the disseisin or other accrual of the cause of action is once removed, the fact that a subsequent disability intervenes, as when an infant, after arriving at age, marries, such subsequent disability does not operate in her favor.<sup>30</sup>

If the owner of the land is under two or more disabilities at the time of the accrual of the cause of action, he may take advantage of both, or, rather, of the one which endures the longest;<sup>31</sup> but if only one disability exists at that time, he can take advantage of that alone, and the fact that, before such disability terminates, another intervenes, as when an infant *feme sole* marries, does not extend the time for the recovery of the land, or, as it is frequently stated, disabilities cannot be "tacked."<sup>32</sup> Likewise, the disabilities of different persons cannot be tacked, in order to make up the

<sup>29</sup> *Harris v. McGovern*, 99 U. S. 161, affirming 2 Sawy. 515, Fed. Cas. No. 6,125; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334; *Burdett v. May*, 100 Mo. 13; *Ray v. Thurman's Ex'r*, 13 Ky. Law Rep. 3, 15 S. W. 1116; *Lynch v. Cox*, 23 Pa. St. 265; *Jackson v. Moore*, 13 Johns. (N. Y.) 513, 7 Am. Dec. 398; *Oates v. Beckworth*, 112 Ala. 356; *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84. Contra, *Everett's Ex'rs v. Whitfield's Adm'rs*, 27 Ga. 133.

<sup>30</sup> *Gherson v. Brooks* (Ark.) 5 S. W. 329; *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434.

<sup>31</sup> *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Butler v. Howe*, 13 Me. 397; *North v. James*, 61 Miss. 761; *Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 530.

<sup>32</sup> *Bunce v. Wolcott*, 2 Conn. 27, 3 Gray's Cas. 104; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 476, *Finch's Cas.* 1047; *Duckett v. Crider*, 11 B. Mon. (Ky.) 188; *White v. Clawson*, 79 Ind. 188; *Cozzens v. Farnan*, 30 Ohio St. 491, 27 Am. Rep. 470; *McFarland v. Stone*, 17 Vt. 165, 44 Am. Dec. 325; *Nutter v. De Rochemont*, 46 N. H. 80; *Thompson v. Smith*, 7 Serg. & R. (Pa.) 209. Contra, *Miller v. Bumgardner*, 109 N. C. 412.

statutory period; and so, if the owner is under a disability from the time of the accrual of the disability till his death, his infant heir cannot tack his own disability to that of his ancestor, in order to extend the statutory period.<sup>33</sup>

§ 440. Exception in favor of the sovereign.

According to the maxim *Nullum tempus occurrit regi*, the adverse possession of land belonging either to the United States or a state cannot, unless the statute otherwise provides, divest the government title.<sup>34</sup> The statutory limitation begins, however, to run in favor of one in hostile possession of public land so soon as its ownership passes to a grantee of the government. In determining the time at which the private ownership begins for this purpose, the decisions are not in accord, some holding that it does not begin until the issue of the patent,<sup>35</sup> while others consider it as beginning so soon as, by payment for the land, the individual has become entitled to a patent.<sup>36</sup>

The question whether the statute runs against a municipal or *quasi* municipal corporation, so that adverse possession of its land for the statutory period will bar recovery by the mu-

<sup>33</sup> *Dowell v. Tucker*, 46 Ark. 438; *Griswold v. Butler*, 3 Conn. 227; *Pim v. City of St. Louis*, 122 Mo. 654; *Henry v. Carson*, 59 Pa. St. 297; *Jackson v. Houston*, 84 Tex. 622.

<sup>34</sup> *Gibson v. Chouteau*, 13 Wall. (U. S.) 92; *Wagnon v. Fairbanks*, 105 Ala. 527; *Munshower v. Patton*, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678; *Doran v. Central Pac. R. Co.*, 24 Cal. 245; *Twining v. City of Burlington*, 68 Iowa, 284; *Hall v. Gittings' Lessee*, 2 Har. & J. (Md.) 112; *Hall v. Webb*, 21 W. Va. 318. See, as to statutes on the subject, 2 *Dembitz, Land Titles*, § 179.

<sup>35</sup> *Smith v. McCorkle*, 105 Mo. 135; *Steele v. Boley*, 7 Utah, 64; *Stringfellow v. Tennessee Coal, Iron & Railroad Co.*, 117 Ala. 250; *Mathews v. Ferrea*, 45 Cal. 51; *Chiles v. Calk*, 4 Bibb (Ky.) 554.

<sup>36</sup> *Patten v. Scott*, 118 Pa. St. 115, 4 Am. St. Rep. 576; *Udell v. Peak*, 70 Tex. 547; *Nichols v. Council*, 51 Ark. 26, 14 Am. St. Rep. 20.



nicipality, has been the subject of much discussion, and the decisions are not in accord on the question. In the majority of the states, land owned by a municipality, and devoted to uses of a purely public character, as when the "fee" of a street or park is vested in the municipality, or land is conveyed to the municipality for a public building, hospital, or the like, the municipality is regarded as merely the agent of the state, and its rights cannot be divested by adverse possession,<sup>37</sup> though in a number of states a different view obtains.<sup>38</sup> But even in the former class of states there is a tendency to distinguish between land devoted to public use and that which is held by the municipality in a "private capacity," and over which it has the power of alienation, the latter being regarded as subject to the bar of the statute.<sup>39</sup>

**§ 441. Actual and visible possession.**

In order to confer title by adverse possession, it is necessary that there be an actual entry on the land, and the mere fact that one has what purports to be a conveyance of the land, or other paper title, is never sufficient.<sup>40</sup> Nor is an

<sup>37</sup> *Almy v. Church*, 18 R. I. 182; *Cheek v. City of Aurora*, 92 Ind. 107; *Webb v. City of Demopolis*, 95 Ala. 116; *Kittaning Academy v. Brown*, 41 Pa. St. 269; *Board of Education of City and County of San Francisco v. Martin*, 92 Cal. 209; *Taraldson v. Incorporated Town of Lime Springs*, 92 Iowa, 187; *Ralston v. Town of Weston*, 46 W. Va. 544; *City of Sullivan v. Tichenor*, 179 Ill. 97. See 2 *Dillon*, *Mun. Corp.* (4th Ed.) §§ 667-675.

<sup>38</sup> *Oxford Township v. Columbia*, 38 Ohio St. 87; *City of Covington v. McNickle's Heirs*, 18 B. Mon. (Ky.) 262; *City of Fort Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19; *Village of Wayzata v. Great Northern Ry. Co.*, 50 Minn. 438.

<sup>39</sup> See *Simplot v. Chicago, M. & St. P. Ry. Co. (C. C.)* 16 Fed. 350; *Ames v. City of San Diego*, 101 Cal. 390; *City of Chicago v. Middlebrooke*, 143 Ill. 265; *City of Bedford v. Willard*, 133 Ind. 562; 2 *Dillon*, *Mun. Corp.* (4th Ed.) 675.

<sup>40</sup> *Thayer v. McLellan*, 23 Me. 417; *Walker v. Hughes*, 90 Ga. 52; *Christy v. Spring Valley Water Works*, 97 Cal. 21; *Lipscomb v.* (1006)

entry on the land sufficient, unless it is followed by such acts of dominion over the land as will constitute what the law regards as actual possession of the land. What is sufficient to constitute this actual possession depends upon the character of the land and all the circumstances of the case. It involves, as a general rule, the doing of acts of dominion on the land, sufficiently pronounced and continuous in character to charge the owner with notice that an adverse claim to the land is asserted. Continued residence on the land is no doubt sufficient to show actual possession;<sup>41</sup> and cultivation or otherwise improving the land has been regarded as sufficient in particular cases,<sup>42</sup> and the erection of a fence around the land may, in some cases, be sufficient.<sup>43</sup> On the other hand, a merely occasional and sporadic use of the land, an occasional entry to cut timber or grass, or to appropriate other products or profits of the land, does not constitute actual possession.<sup>44</sup> The question whether, in any particular case, there was an actual possession of the land, is usually one of fact for the jury under the instructions of the court.<sup>45</sup>

McClellan, 72 Ala. 151; *White v. Burnley*, 20 How. (U. S.) 235; *Ward v. Cochran*, 150 U. S. 597, *Finch's Cas.* 1013.

<sup>41</sup> *Susquehanna & W. V. Railroad & Coal Co. v. Quick*, 68 Pa. St. 189; *Alabama State Land Co. v. Kyle*, 99 Ala. 474. Under some of the "short limitation" statutes, actual residence is necessary. *Stumpf v. Osterhage*, 94 Ill. 115; *Chiles v. Jones*, 4 Dana (Ky.) 479.

<sup>42</sup> *Butler v. Drake*, 62 Minn. 229; *Susquehanna & W. V. Railroad & Coal Co. v. Quick*, 68 Pa. St. 189; *Congdon v. Morgan*, 14 S. C. 587; *Crapo v. Cameron*, 61 Iowa, 447; *Finn v. Wisconsin River Land Co.*, 72 Wis. 546; *Johns v. McKibben*, 156 Ill. 71.

<sup>43</sup> *Moore v. McCown* (Tex. Civ. App.) 20 S. W. 1112; *Brumagim v. Bradshaw*, 39 Cal. 24, 50.

<sup>44</sup> *Bazille v. Murray*, 40 Minn. 48; *Denham v. Holeman*, 26 Ga. 182, 71 Am. Dec. 198; *Parker v. Wallis*, 60 Md. 15, 45 Am. Rep. 703; *Cornelius v. Giberson*, 25 N. J. Law, 1; *Williams v. Wallace*, 78 N. C. 354; *Wheeler v. Winn*, 53 Pa. St. 122, 91 Am. Dec. 186; *Wilson v. Blake*, 53 Vt. 305; *Parker v. Parker*, 1 Allen (Mass.) 245.

<sup>45</sup> *Anderson v. Bock*, 15 How. (U. S.) 323; *Truesdale v. Ford*, 37

The possession must, it is said, be "visible" and "notorious," so that the owner may have an opportunity to learn of the adverse claim, and to protect his rights.<sup>46</sup> Actual knowledge of the possession on the part of the true owner is not, however, necessary, it being sufficient that he could have learned thereof by going upon the land and making inquiry.<sup>47</sup> And since the requisites of "actual" possession are usually defined with reference to the sufficiency of such acts to affect the owner with notice of the adverse claim, it would seem somewhat questionable whether there can be any "actual" possession which is not at the same time "visible" and "notorious."

#### § 442. Exclusiveness of possession.

In order that one may acquire rights in land by possession for the statutory period, it is necessary that his possession be exclusive.<sup>48</sup> The possession must be exclusive of the owner, since, if the latter is also in possession, the possession of another must be regarded as under license from him, or as merely a trespass,<sup>49</sup> and it must also be exclusive of third

Ill. 210; *Pendill v. Marquette County Agricultural Soc.*, 95 Mich. 491; *Martin v. Rector*, 30 Hun (N. Y.) 138.

<sup>46</sup> *McClellan v. Kellogg*, 17 Ill. 498, *Finch's Cas.* 1016; *De Frieze v. Quint*, 94 Cal. 653, 28 Am. St. Rep. 151, note; *Beatty v. Mason*, 30 Md. 409; *Thompson v. Pioche*, 44 Cal. 508; *King v. Wells*, 94 N. C. 344; *Fugate v. Pierce*, 49 Mo. 441; *Little v. Downing*, 37 N. H. 355; *Grimes v. Ragland*, 28 Ga. 123, *Finch's Cas.* 1029.

<sup>47</sup> *Village of Glencoe v. Wadsworth*, 48 Minn. 402; *School Dist. No. 8 of Thompson v. Lynch*, 33 Conn. 330; *Key v. Jennings*, 66 Mo. 367; *Samuels v. Borrowscale*, 104 Mass. 207; *Warfield v. Lindell*, 38 Mo. 561, 90 Am. Dec. 443; *Alden v. Gilmore*, 13 Me. 178.

<sup>48</sup> *Ward v. Cochran*, 150 U. S. 597, *Finch's Cas.* 1013; *Stump v. Henry*, 6 Md. 201, 61 Am. Dec. 301; *Goodson v. Brothers*, 111 Ala. 589; *Collins v. Lynch*, 167 Pa. St. 635; *Cahill v. Palmer*, 45 N. Y. 478.

<sup>49</sup> *Brown v. Chicago, B. & K. C. Ry. Co.*, 101 Mo. 484; *Larwell v. Stevens* (C. C.) 12 Fed. 559; *Bellis v. Bellis*, 122 Mass. 414; *Smith v. Hitchcock*, 38 Neb. 104; *O'Hara v. Richardson*, 46 Pa. St. 385. (1008)

persons,—that is, the exercise of acts of possession by the claimant is insufficient if he allows other persons to do the same.<sup>50</sup>

### § 443. Hostile character of possession.

In order that the possession of one person for the statutory period may defeat the right of the original owner to recover the land, it is necessary that the possession be hostile to such owner, under a claim of right, and such as to exclude any recognition of the rights of the true owner. There are numerous legal relations which, from their nature, are regarded as raising a presumption that the person in possession is holding in subordination to, and in recognition of, the rights of another,—a presumption which, as a rule, can be rebutted only by evidence of a distinct denial of the other's rights.

The possession of a trustee under an express trust is not adverse to his *cestui que trust*,<sup>51</sup> nor is that of an agent adverse to his principal.<sup>52</sup> Likewise, the possession of a tenant in common is not adverse to that of his cotenant.<sup>53</sup> In

<sup>50</sup> Bailey v. Carleton, 12 N. H. 9, 37 Am. Dec. 190; Gittings v. Moale, 21 Md. 135; Kneller v. Lang, 137 N. Y. 589; Burrows v. Gallup, 32 Conn. 493, 87 Am. Dec. 186.

<sup>51</sup> Meacham v. Bunting, 156 Ill. 586, 47 Am. St. Rep. 239; Dunn v. Wheeler, 86 Me. 238; Miller v. Bingham, 36 N. C. 423, 36 Am. Dec. 58; Williams v. First Presbyterian Soc. in Cincinnati, 1 Ohio St. 478; Seymour v. Freer, 8 Wall. (U. S.) 202; Angell, Limitations, § 468 et seq.

<sup>52</sup> Baucum v. George, 65 Ala. 259; Martin v. Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Hoskins v. Byler, 53 Ark. 532; Peabody v. Leach, 18 Wis. 657; Peabody v. Tarbell, 2 Cush. (Mass.) 226.

<sup>53</sup> Holley v. Hawley, 39 Vt. 534, 94 Am. Dec. 350; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Brewer v. Keeler, 42 Ark. 289; Coogler v. Rogers, 25 Fla. 853; Rust v. Rust, 17 W. Va. 901; Page v. Branch, 97 N. C. 97, 2 Am. St. Rep. 281; Oglesby v. Hollister, 76 Cal. 136, 9 Am. St. Rep. 177; Greenhill v. Biggs, 85 Ky. 155, 7 Am. St. Rep. 579; Peden v. Cavins, 134 Ind. 494, 39 Am. St. Rep. 276.

any case, however, though one of these relations exist, the person in possession may repudiate the relation, and claim to hold in his own right, in which case the statute of limitations will begin to run in his favor as if between strangers.<sup>54</sup>

The possession of the grantor in a conveyance after the delivery thereof is regarded as *prima facie* by permission of the grantee, and consequently not adverse to the latter, unless he, by word or act, asserts a claim to the premises in his own behalf.<sup>55</sup>

The possession of the tenant is in subordination to the rights of his landlord, and is not adverse to the latter.<sup>56</sup> The tenant may, however, disclaim to hold under the landlord, and, since this gives the landlord the right immediately to recover possession of the land,<sup>57</sup> the statute of limitations begins to run, provided the disclaimer is known to the landlord, or is so open and notorious that the landlord's knowledge thereof may be presumed.<sup>58</sup>

<sup>54</sup> *Zeller's Lessee v. Eckert*, 4 How. (U. S.) 289; *Whiting's Heirs v. Taylor's Heirs*, 8 Dana (Ky.) 403; *Congregational Soc. & Church in Newington v. Town of Newington*, 53 N. H. 595; *Williams v. First Presbyterian Soc. in Cincinnati*, 1 Ohio St. 478; *Catlin v. Decker*, 38 Conn. 262; *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384. As to the acts necessary to constitute an ouster of one co-tenant, so as to render the possession of the other adverse, see ante, § 168.

<sup>55</sup> *Jay v. Whelchel*, 78 Ga. 786; *Rowe v. Beckett*, 30 Ind. 154, 95 Am. Dec. 676; *Sellers v. Crossan*, 52 Kan. 570; *Olwine v. Holman*, 23 Pa. St. 279; *Schwallback v. Chicago, M. & St. P. Ry. Co.*, 69 Wis. 292, 2 Am. St. Rep. 740. See *Knight v. Knight*, 178 Ill. 553.

<sup>56</sup> *Willison v. Watkins*, 3 Pet. (U. S.) 43; *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462; *Galloway's Lessee v. Ogle*, 2 Binn. (Pa.) 468; *Pharis v. Jones*, 122 Mo. 125; *Alabama State Land Co. v. Kyle*, 99 Ala. 474; *Doherty v. Matsell*, 119 N. Y. 646, *Finch's Cas.* 1019; *Whiting v. Edmunds*, 94 N. Y. 309.

<sup>57</sup> See ante, § 52(f).

<sup>58</sup> *McGinnis v. Porter*, 20 Pa. St. 80; *Duke v. Harper*, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; *Reusens v. Lawson*, 91 Va. 226; *Swann v. Thayer*, 36 W. Va. 46; *Austin v. Wilson*, 46 Iowa, 362; (1010)



The holding over by a tenant after the termination of the term is regarded as not adverse to the landlord, but rather as in subordination to his rights, in the absence of any disclaimer on the part of the tenant.<sup>59</sup> But while, in this case, the common-law principle that a tenant by sufferance is not a disseisor is applied, it is not usually applied in the case of a holding over by a tenant *pur autre vie*, the grantee of a tenant for life, to whom the remainderman or reversioner does not stand in the relation of landlord.<sup>60</sup>

Since the possession of a mortgagor is perfectly consistent with his recognition of the rights of the mortgagee, such possession, before any breach of the condition of the mortgage, is not adverse, so that its continuance for the statutory period of limitation will bar the mortgagee's rights, unless these are openly denied by the mortgagor, and the mortgage repudi-

Ponder v. Cheeves, 104 Ala. 307; Sanscrainte v. Torongo, 87 Mich. 69; Doherty v. Matsell, 119 N. Y. 646, Finch's Cas. 1019.

<sup>59</sup> Whaley v. Whaley, 1 Speer (S. C.) 225; Gwynn v. Jones' Lessee, 2 Gill & J. (Md.) 173; Schuylkill & D. Improvement & Railroad Co. v. McCreary, 58 Pa. St. 304; Alderson v. Marshall, 7 Mont. 288; Carson v. Broady, 56 Neb. 648, 71 Am. St. Rep. 691; Holman v. Bonner, 63 Miss. 131; Watson v. Smith's Lessee, 10 Yerg. (Tenn.) 476; Angell, Limitations, §§ 441, 442. In New York the statute provides that the holding of a tenant shall not be adverse till twenty years after the expiration of the term. See Whiting v. Edmunds, 94 N. Y. 309.

<sup>60</sup> Jones v. Johnson, 81 Ga. 293; Jackson v. Harsen, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517; Henley v. Wilson, 77 N. C. 216; Rosenau v. Childress, 111 Ala. 214. And see Safford v. Stubbs, 117 Ill. 389.

So it is frequently said that the statutory period does not begin to run against the remainderman until the death of the life tenant, implying that then it necessarily does so. See cases cited post, note 65. For the contrary view, that it does not run against a tenant *pur autre vie* holding over, see Bannon v. Brandon, 34 Pa. St. 263, 75 Am. Dec. 655; Day v. Cochran, 24 Miss. 261. The English cases decided under the Statute of James were not in accord in this respect. See Doe d. Souter v. Hull, 2 Dowl. & R. 38, 3 Gray's Cas. 60; Doe d. Parker v. Gregory, 2 Adol. & E. 14, 3 Gray's Cas. 68; Lightwood, Possession of Land, 162.

ated.<sup>61</sup> The possession of the mortgagee likewise is regarded, except in so far as it is necessary for his security, as in behalf of the mortgagor, to whom he must account for the rents and profits,<sup>62</sup> and is consequently not adverse, in the absence of a denial of the mortgagor's rights.<sup>63</sup>

The possession of a licensee is not adverse to that of the licensor, unless and until he asserts a claim to the land hostile to the rights of the latter.<sup>64</sup>

A possession cannot be regarded as hostile to one who, owing to the fact that he has no right of possession, cannot sue to protect it, and consequently, as a rule, until the death of a tenant for life, the statute does not begin to run against a remainderman in favor of a third person.<sup>65</sup>

<sup>61</sup> *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572; *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233; *Chouteau v. Riddle*, 110 Mo. 366; *Boyd v. Beck*, 29 Ala. 703; *Holmes v. Turner's Falls Co.*, 150 Mass. 535; *Flynn v. Lee*, 31 W. Va. 487; *Grether v. Clark*, 75 Iowa, 383, 9 Am. St. Rep. 491; *Tripe v. Marcy*, 39 N. H. 439; *Creigh's Heirs v. Henson*, 10 Grat. (Va.) 231; *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489.

<sup>62</sup> See post, § 520.

<sup>63</sup> *Warder v. Enslen*, 73 Cal. 291; *Green v. Turner*, 38 Iowa, 112; *Anding v. Davis*, 38 Miss. 574, 77 Am. Dec. 658; *Holmes v. Turner's Falls Co.*, 150 Mass. 535; *Kip v. Hirsh*, 53 N. Y. Super. Ct. 1; *Cholmondeley v. Clinton*, 2 Jac. & W. 1.

<sup>64</sup> *Cameron v. Chicago, M. & St. P. Ry. Co.*, 60 Minn. 100; *Blaisdell v. Portsmouth, G. F. & C. R. Co.*, 51 N. H. 483; *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; *Curtis v. La Grande Hydraulic Water Co.*, 20 Or. 34; *Kittaning Academy v. Brown*, 41 Pa. St. 269; *Sanitary Dist. of Chicago v. Allen*, 178 Ill. 330.

<sup>65</sup> *Angell, Limitations*, § 371 et seq.; *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151; *Anderson v. Northrop*, 30 Fla. 612; *Mettler v. Miller*, 129 Ill. 630; *Rosenau v. Childress*, 111 Ala. 214; *Pratt v. Churchill*, 42 Me. 471; *Bagley v. Kennedy*, 81 Ga. 721; *Lindley v. Groff*, 37 Minn. 338; *Pinckney v. Burrage*, 31 N. J. Law, 21; *Davis v. Dickson*, 92 Pa. St. 365; *Moseley v. Hankinson*, 25 S. C. 519; *Wallingford v. Hearl*, 15 Mass. 471; *Watkins v. Green*, 101 Mich. 493; *Higgins v. Crosby*, 40 Ill. 260.

In Illinois, under the short limitation act, however, it is held that, (1012)

One who goes into possession of land under a transfer of the land from the owner, which is invalid because oral merely, may assert the bar of the statute against the owner if his possession continues for the statutory period, since his possession is under a claim of right which is necessarily exclusive of any rights in the transferee.<sup>66</sup> Likewise the possession of one who enters under an executory contract for a conveyance is usually regarded as adverse to his vendor from the time of the payment of the purchase money,<sup>67</sup> and generally a grantee's possession is regarded as adverse to the rights of the grantor, whatever be the defects in the grant.<sup>68</sup>

— **Mistake in locating boundary.**

The question has frequently arisen whether, when an owner of land, by mistake as to the boundary line of his land,

if the possession is by one not claiming merely as assignee of the life estate, but as the owner of fee, it is adverse to the remainderman, since, though the latter cannot sue for possession, he can prevent the running of the statute by paying the taxes. *Nelson v. Davidson*, 160 Ill. 254. Moreover, in that state, the remainderman, to be protected, must claim under an instrument which appears of record, or of which the person in possession has notice. *Lewis v. Barnhart*, 145 U. S. 56.

<sup>66</sup> *Sumner v. Stevens*, 6 Metc. (Mass.) 337; *Schafer v. Hauser*, 111 Mich. 622, 66 Am. St. Rep. 403; *Vandiveer v. Stickney*, 75 Ala. 225; *Clark v. Gilbert*, 39 Conn. 94; *Stewart v. Duffy*, 116 Ill. 47; *Rannels v. Rannels*, 52 Mo. 109; *Trotter v. Neal*, 50 Ark. 340; *Stodstill v. Willcox*, 94 Ga. 690; *Bartlett v. Secor*, 56 Wis. 520; *Campbell v. Braden*, 96 Pa. St. 388.

<sup>67</sup> *Furlong v. Garrett*, 44 Wis. 111; *Watts v. Witt*, 39 S. C. 356; *East Tennessee, V. & G. Ry. Co. v. Davis*, 91 Ala. 615; *Adams v. Fullam*, 43 Vt. 592; *Catlin v. Decker*, 38 Conn. 262.

<sup>68</sup> *Nowlin v. Reynolds*, 25 Grat. (Va.) 137; *Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744; *Mattison v. Ausmuss*, 50 Mo. 551; *Carmody v. Chicago & A. R. Co.*, 111 Ill. 69; *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 239, 68 Am. Dec. 723; *Case v. Green*, 53 Mich. 615; *Melvin v. Proprietors of Locks & Canals on Merrimack River*, 5 Metc. (Mass.) 15, 38 Am. Dec. 384.

takes possession of another's land, and holds it for the statutory period, he thereby acquires the title as against the real owner. In some states, in such a case, the possession is regarded as adverse, without reference to the fact that it is based on mistake, it being sufficient that actual and visible possession is taken under claim of right.<sup>69</sup> In other states the fact that, in such case, the possession of the other's land is under mistake, is regarded as material, and a distinction is asserted to the effect that, if such possession up to the boundary as located is with the intention of claiming to such boundary even though the boundary be incorrect, the possession is adverse, while, if it is with the intention of claiming thereto only if the boundary is correct, the possession is not adverse.<sup>70</sup>

Of these two views the former seems to be decidedly preferable, from the standpoint of both principle and convenience of application. Of the latter it may be said, not only does it confer a premium upon conscious wrongdoing, but it

<sup>69</sup> *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680, 3 Gray's Cas. 76; *Yetzer v. Thoman*, 17 Ohio St. 130, 91 Am. Dec. 122; *Metcalfe v. McCutchen*, 60 Miss. 145; *Burnell v. Maloney*, 39 Vt. 579, 94 Am. Dec. 358; *Tex v. Pflug*, 24 Neb. 666, 8 Am. St. Rep. 231; *Levy v. Yerga*, 25 Neb. 764, 13 Am. St. Rep. 525; *Seymour, Sabin & Co. v. Carli*, 31 Minn. 81; *Ramsey v. Glenny*, 45 Minn. 401, 22 Am. St. Rep. 736; *Greene v. Anglemire*, 77 Mich. 168; *Crary v. Goodman*, 22 N. Y. 170; *Tolman v. Sparhawk*, 5 Metc. (Mass.) 469; *Grim v. Murphy*, 110 Ill. 271 (semble); *Dyer v. Eldridge*, 136 Ind. 654. See *Bishop v. Bleyer*, 105 Wis. 330.

<sup>70</sup> *Wilson v. Hunter*, 59 Ark. 626, 43 Am. St. Rep. 63; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139; *Taylor v. Fomby*, 116 Ala. 621; *Ayers v. Reidel*, 84 Wis. 276, *Finch's Cas.* 1016; *Grube v. Wells*, 34 Iowa, 148, 3 Gray's Cas. 82; *Mills v. Penny*, 74 Iowa, 172, 7 Am. St. Rep. 474; *Winn v. Abeles*, 35 Kan. 85, 57 Am. Rep. 138; *Preble v. Maine Cent. R. Co.*, 85 Me. 260, 35 Am. St. Rep. 366; *McCabe v. Bruere*, 153 Mo. 1; *Finch v. Ullman*, 105 Mo. 255, 24 Am. St. Rep. 383, note; *Caufield v. Clark*, 17 Or. 473, 11 Am. St. Rep. 845; *King v. Brigham*, 23 Or. 262; *Chance v. Branch*, 58 Tex. 490.



introduces into the law of adverse possession a requirement that is never asserted in connection therewith except in the case of mistake in locating a boundary. Under such a rule, generally applied, a man would never be in adverse possession of land unless he had the intention of claiming the land in case his title turned out to be defective. As a matter of fact, a person who believes that he owns certain land, or land up to a certain boundary, has no thought as to what he will do in case he is mistaken in his belief. Furthermore, assuming that there is an intention in the mind of the possessor, such an intention is necessarily difficult, and frequently impossible, of determination, with any approach to accuracy.<sup>71</sup>

**§ 444. Extent of possession.**

As a general rule, one can acquire by adverse possession so great an extent of land only as is covered by his acts of actual possession, continued through the statutory period.<sup>72</sup> It is, however, a well-recognized principle in this country that one having "color of title"—that is, claiming under what purports to be a valid muniment of title, although he actually occupies a part only of the tract conveyed—is to be regarded as in constructive possession of the whole tract for the purpose of barring the entry of the owner after the lapse of the statutory period.

<sup>71</sup> "Adopt the rule that an entry and possession under a claim of right, if through mistake, does not constitute an adverse possession. \* \* \* the inquiry no longer is whether visible possession, with the intent to possess, under a claim of right, and to use and enjoy as one's own, is a disseisin, but from this plain and easy standard of proof we are to depart, and the invisible motives of the mind are to be explored." *French v. Pearce*, 8 Conn. 439, 3 Gray's Cas. 76, per Hosmer, C. J.

<sup>72</sup> *Proprietors of Kennebeck Purchase v. Springer*, 4 Mass. 416, *Finch's Cas.* 1021; *Ferguson v. Peden*, 33 Ark. 150; *Garrison v. Sampson*, 15 Cal. 93; *Bristol v. Carroll County*, 95 Ill. 84; *Barber v. Robinson*, 78 Minn. 193; *Allen v. Mansfield*, 108 Mo. 343; *Ege v. Medlar*, 82 Pa. St. 86; *Langdon v. Templeton*, 66 Vt. 173.



This rule is founded on the theory that one who has notice of an adverse occupancy of part of his land under a claim of title based on written evidence thereof is chargeable with notice that the claim is limited only by the terms of the conveyance. The rule applies not only when possession is taken under a conveyance which is invalid, either for want of title or capacity in the grantor, or for want of proper formalities in the execution of the instrument,<sup>73</sup> but also when it is taken under a void or voidable decree of court,<sup>74</sup> and generally when there is what is known as a "paper title." There is, however, considerable question as to whether a conveyance void on its face constitutes "color of title" for this purpose, or for the purpose of the short limitation acts.<sup>75</sup> A conveyance which does not contain any sufficient description of the land sought to be conveyed is necessarily insufficient as color of title for the purpose of constructive possession.<sup>76</sup>

<sup>73</sup> *Noyes v. Dyer*, 25 Me. 468; *Stull v. Rich Patch Iron Co.*, 92 Va. 253; *Finch's Cas.* 1023; *Ellington v. Ellington*, 103 N. C. 54; *Hecock v. Van Dusen*, 80 Mich. 359; *Fugate v. Pierce*, 49 Mo. 447; *Miesen v. Canfield*, 64 Minn. 513; *Swift v. Mulkey*, 17 Or. 532; *Wright v. Mattison*, 18 How. (U. S.) 50; *Carter v. Chevalier*, 108 Ala. 563.

<sup>74</sup> *Bynum v. Thompson*, 25 N. C. 578; *Reedy v. Camfield*, 159 Ill. 254.

<sup>75</sup> That a conveyance void on its face does not give color of title, see *Frique v. Hopkins*, 8 Mart. (La.) 110; *Redfield v. Parks*, 132 U. S. 239; *Larkin v. Wilson*, 28 Kan. 513. Contra, *Reddick v. Long*, 124 Ala. 260; *Miesen v. Canfield*, 64 Minn. 513; *Barger v. Hobbs*, 67 Ill. 592; *Wilson v. Atkinson*, 77 Cal. 485.

Sometimes the view is taken that a conveyance defective on its face will be sufficient as color of title if the defect is such that a person unlearned in the law would have reason to consider the instrument valid. *Beverly v. Burke*, 9 Ga. 443, 54 Am. Dec. 351; *Avent v. Arrington*, 105 N. C. 377, 390.

<sup>76</sup> *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525, 3 Gray's Cas. 88; *Bellows v. Jewell*, 60 N. H. 420; *Davis v. Stroud*, 104 N. C. 484; *Ohio & M. Ry. Co. v. Barker*, 125 Ill. 303; *Reddick v. Long*, 124 Ala. 260.

In order that this principle, giving one constructive possession beyond the limits of his actual occupancy, may apply, not only the land not actually occupied, but also that occupied, must belong to the same person, and the owner of land is not affected with notice as of a constructive possession of his land by the fact that it is included in a conveyance with other land not belonging to him, if such other land alone is occupied by the claimant.<sup>77</sup>

The fact that the true owner of land is in actual possession of part of the land prevents the application, in favor of another, of the rule of constructive possession by color of title as to the land not occupied by the true owner.<sup>78</sup> The rule, moreover, cannot be applied in favor of one person as against another who has previously obtained constructive possession of the same land,—that is, in the case of overlapping conveyances, neither of which is valid, the grantee who first takes actual possession of part of the land included in his conveyance obtains constructive possession of the land covered by both conveyances, to the exclusion of the subsequent acquisition of merely constructive possession of such land by the other.<sup>79</sup>

The land in actual possession must adjoin that of which

<sup>77</sup> *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190, 3 Gray's Cas. 99; *Word v. Box*, 66 Tex. 596; *Korner v. Rankin's Heirs*, 11 Grat. (Va.) 420; *Garrett v. Ramsey*, 26 W. Va. 345; *Turner v. Stephenson*, 72 Mich. 409; *Hicklin v. McClear*, 18 Or. 126; *Hole v. Rittenhouse*, 25 Pa. St. 491.

<sup>78</sup> *Hunnicuttt v. Peyton*, 102 U. S. 333; *Hall v. Powel*, 4 Serg. & R. (Pa.) 456, 8 Am. Dec. 722; *Semple v. Cook*, 50 Cal. 26; *Langdon v. Templeton*, 66 Vt. 173; *Claiborne v. Elkins*, 79 Tex. 380; *Bradley v. West*, 60 Mo. 33. But that this is the case only if such actual possession by the true owner existed before the constructive possession by the claimant, see *Stull v. Rich Patch Iron Co.*, 92 Va. 253, *Finch's Cas.* 1023.

<sup>79</sup> *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677, 3 Gray's Cas. 91; *Frisby v. Withers*, 61 Tex. 134; *Garrett v. Ramsey*, 26 W. Va. 345.

constructive possession is claimed,<sup>80</sup> and the two tracts of land must, according to some decisions, be included within one description in the instrument under which the claim is made, and, if they are described as separate tracts, it is immaterial that the descriptions are both in one conveyance.<sup>81</sup>

In some states there is a restriction upon the application of the rule of constructive possession, to the effect that it will apply only when the land claimed by reason of constructive possession is such, in character and extent, that its use in connection with the land actually occupied would be in accord with the custom of the country.<sup>82</sup> In other states no such restriction upon the application of the rule is recognized, it being only necessary that the actual possession be of a visible character, however small it may be in extent in comparison with the land claimed.<sup>83</sup>

<sup>80</sup> *Herbst v. Merrifield*, 133 Mo. 267; *Wilson v. McEwan*, 7 Or. 87; *Georgia Pine Inv. & Mfg. Co. v. Holton*, 94 Ga. 551; *Brown v. Bocquin*, 57 Ark. 97; *West v. McKinney*, 92 Ky. 638.

<sup>81</sup> *Morris v. McClary*, 43 Minn. 346; *Grimes v. Ragland*, 28 Ga. 123, *Finch's Cas.* 1029; *Griffin v. Lee*, 90 Ga. 224; *Den d. Carson v. Mills*, 18 N. C. 546, 30 Am. Dec. 143; *Doe d. Loflin v. Cobb*, 46 N. C. 406, 62 Am. Dec. 173; *Montgomery v. Gunther*, 81 Tex. 320; *Farrar v. Eastman*, 10 Me. 191; *Willamette Real Estate Co. v. Hendrix*, 28 Or. 485. *Contra*, *Dills v. Hubbard*, 21 Ill. 328.

<sup>82</sup> *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276; *Simpson v. Downing*, 23 Wend. (N. Y.) 316, 3 *Gray's Cas.* 94; *Pepper v. O'Dowd*, 39 Wis. 538 (stat.); *Thompson v. Burhans*, 61 N. Y. 52; *Paine v. Hutchins*, 49 Vt. 314. See *Murphy v. Doyle*, 37 Minn. 113; *Turner v. Stephenson*, 72 Mich. 409.

<sup>83</sup> See *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103; *Doe d. Lenoir v. South*, 32 N. C. 237; *Grigsby v. May*, 84 Tex. 240.

## CHAPTER XXIV.

### PRESCRIPTION FOR INCORPOREAL THINGS.

- § 445. General considerations.
- 446. Tacking.
- 447. Personal disabilities.
- 448. Continuity of user.
- 449. Exclusiveness of user.
- 450. Hostile character of user.
- 451. Specific rights.
- 452. Rights in the public.

The adverse user of another's land, as if in enjoyment of an easement or right of profit therein, will, if continued for the statutory period of limitation, usually create a corresponding easement or right of profit in the land, this being known as prescription.

The user need not be by one person for the whole period, but may be by different persons in privity with one another.

The prescriptive period does not run, as against an owner of land, who is under a disability at the time of the beginning of such user, until the termination of the disability.

The user must be continuous for the prescriptive period, and is not sufficient if actually interrupted by the owner of the land, though mere protests by him against the user do not effect an interruption.

The user must be such as to give a right of action to the owner of the land against the person exercising the user, and for this reason rights to the passage of light or to support, and rights to the percolation of water from adjoining land, cannot usually be thus acquired.

The public may, by the user of private land for purposes of passage during the statutory period, acquire highway rights therein.

**§ 445. General considerations.**

Though the Statute of Westminster I., establishing a date back of which the pleader could not go,<sup>1</sup> applied to actions for the recovery of the land only, and not to those for the recovery of incorporeal things, "the judges, with that assumption of legislative authority which has at times characterized our judicature, proceeded to apply the rule as to prescription established by the statute to incorporated hereditaments, and, among others, to easements."<sup>2</sup> Subsequently, when, by the Statute of 32 Hen. VIII. c. 2, and 21 Jac. I. c. 16, the time for bringing a writ of right or a possessory action to recover land was reduced to sixty and twenty years, respectively, it might have been expected that the judges would, as in the case of the earlier act, apply the analogy of these acts to incorporeal things. This, however, it seems, they did not do,<sup>3</sup> but they effected the same end by the adoption of the fiction that a grant of the right would be presumed if it had been exercised for a period of twenty years; this doctrine of a lost grant being in reality prescription, under another name, shortened in analogy to the period of limitation fixed by the Statute of James.<sup>4</sup> In the case of prescription, as it existed by analogy to the early statute, the exercise of the right from the date named conferred an unimpeachable title. Whether this presumption of a lost grant, on the other hand, had a like effect,—that is, whether

<sup>1</sup> Ante, § 436.

<sup>2</sup> Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. Div. 85, 104.

<sup>3</sup> Gale, *Easements*, 170, citing the statements to that effect in *Angus v. Dalton*, 4 Q. B. Div. at pages 170, 199, per Thesiger and Brett, L. J., and in 6 App. Cas. at page 778, per Fry, J. But that the periods fixed by these statutes was applied in determining the period of "immemorial user" for the purpose of prescription, see *Yard v. Ford*, 2 Saund. 175, note; Gale, *Easements*, 169; *Coolidge v. Learned*, 8 Pick. (Mass.) 504, *Finch's Cas.* 1036.

<sup>4</sup> Gale, *Easements*, 171. See *Coolidge v. Learned*, 8 Pick. (Mass.) 504, *Finch's Cas.* 1036.



it was a conclusive presumption, or could be rebutted by evidence that there was no such grant,—is a question on which there was great doubt. In practice it seems to have been the custom for the court to instruct the jury to find the existence of such a grant, even though there was evidence to show that it did not exist. Eventually the Statute of 2 & 3 Wm. IV. c. 71 (A. D. 1832), termed the “Prescription Act,” was passed, “with the view,” it is said, “of putting an end to the scandal on the administration of justice which arose from thus forcing the consciences of juries.”<sup>5</sup>

In this country the courts have usually followed the analogy of the statute of limitations applicable to actions for the recovery of land, with the effect that one who has exercised a right in another's land for such a statutory period, adversely and under claim of right, is regarded as having such right.<sup>6</sup> And while, quite frequently, it is said that from such user a grant will be presumed, the presumption is in effect a positive rule of law, and evidence that no grant was made would be immaterial.<sup>7</sup> In some states there are statutes providing for the acquisition of rights in another's

<sup>5</sup> Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. Div. 105.

<sup>6</sup> *Melvin v. Whiting*, 10 Pick. (Mass.) 295, 3 Gray's Cas. 184; *Coolidge v. Learned*, 8 Pick. (Mass.) 504, Finch's Cas. 1037; *Mueller v. Fruen*, 36 Minn. 273; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Cobb v. Davenport*, 32 N. J. Law, 369; *Nicholls v. Wentworth*, 100 N. Y. 455; *Legg v. Horn*, 45 Conn. 409; *Krier's Private Road*, 73 Pa. St. 109.

<sup>7</sup> *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536, 3 Gray's Cas. 193; *Coolidge v. Learned*, 8 Pick. (Mass.) 504, Finch's Cas. 237; *Tracy v. Atherton*, 36 Vt. 503, 3 Gray's Cas. 202; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. Law, 605, 3 Gray's Cas. 213; *Wallace v. Fletcher*, 30 N. H. 434; *Okeson v. Patterson*, 29 Pa. St. 22; *Ward v. Warren*, 82 N. Y. 265; *Carter v. Tinicum Fishing Co.*, 77 Pa. St. 310; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312. There are suggestions to the contrary in *Parker v. Foote*, 19 Wend. (N. Y.) 309, 3 Gray's Cas. 187; *Lanier v. Booth*, 50 Miss. 410.

land by their exercise under claim of right for a period named.<sup>8</sup>

While it is well recognized that no rights can be acquired by prescription to maintain a public nuisance, the cases are not in accord on the question whether one's right to set up a prescriptive right of user, as against the private owner of land, is defeated by the fact that such user constitutes, in itself, a public nuisance.<sup>9</sup>

#### § 446. Tacking.

As successive adverse possessions of land by different persons may be tacked in order to make up the statutory period, so successive adverse users by different persons may be tacked for the same purpose,<sup>10</sup> provided there is a privity or contractual connection between them.<sup>11</sup>

#### § 447. Personal disabilities.

The statutory exceptions in the statutes of limitations in favor of persons under legal disability are applied by analogy, in the case of prescription, when the owner of the

<sup>8</sup> Jones, Easements, § 160.

<sup>9</sup> That the fact that it is a public nuisance defeats any right by prescription, see *Woodruff v. North Bloomfield Gravel Min. Co.* (C. C.) 18 Fed. 753; *Bowen v. Wendt*, 103 Cal. 236; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Nolan v. City of New Britain*, 69 Conn. 668; *Kissel v. Lewis*, 156 Ind. 233; *Veazie v. Dwinel*, 50 Me. 479. That its character as a public nuisance does not have that effect, see *Perley v. Hilton*, 55 N. H. 444; *Borden v. Vincent*, 24 Pick. (Mass.) 301; *Lawrence v. Inhabitants of Fairhaven*, 5 Gray (Mass.) 110; *Inhabitants of New Salem v. Eagle Mill Co.*, 138 Mass. 8; *Mills v. Hall*, 9 Wend. (N. Y.) 315, 24 Am. Dec. 160; *Charnley v. Shawano Water Power & River Improvement Co.*, 109 Wis. 563.

<sup>10</sup> *Bradley's Fish Co. v. Dudley*, 37 Conn. 136; *Ross v. Thompson*, 78 Ind. 90; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Leonard v. Leonard*, 7 Allen (Mass.) 277; *Dodge v. Stacy*, 39 Vt. 558.

<sup>11</sup> *Holland v. Long*, 7 Gray (Mass.) 486; *Bryan v. City of East St. Louis*, 12 Ill. App. 390.

land is under disability, and they are usually applied to the same extent, and subject to the same restrictions. So, while the statutory period does not begin to run during the disability of the landowner, if this existed when the right of action on account of the user of the land accrued,<sup>12</sup> a disability thereafter arising will not, by the weight of authority, extend the statutory period,<sup>13</sup> and one disability cannot be tacked to another.<sup>14</sup>

### § 448. Continuity of user.

The user of the land, in order to create a right by prescription, must be continuous for the statutory period.<sup>15</sup> Accordingly, if the owner of the land, in the exercise of his right of ownership, interrupts the exercise of the user, as when he renders the exercise of a claim of passage impossible, the continuity is broken,<sup>16</sup> but the mere doing of acts on the land which render the exercise of the claim less convenient does not necessarily have that effect.<sup>17</sup> The fact that the owner of the land, during the statutory period, protests or remonstrates against the exercise of the asserted right, with-

<sup>12</sup> *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536, 3 Gray's Cas. 193; *Melvin v. Whiting*, 13 Pick. (Mass.) 185, 3 Gray's Cas. 186; *Edson v. Munsell*, 10 Allen (Mass.) 557.

<sup>13</sup> *Tracy v. Atherton*, 36 Vt. 503, 3 Gray's Cas. 203; *Mebane v. Patrick*, 46 N. C. 23; *Wallace v. Fletcher*, 30 N. H. 434; *Edson v. Munsell*, 10 Allen (Mass.) 557. Contra, *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536, 3 Gray's Cas. 193. See *Melvin v. Whiting*, 13 Pick. (Mass.) 184, 185, 3 Gray's Cas. 186.

<sup>14</sup> *Reimer v. Stuber*, 20 Pa. St. 458, 59 Am. Dec. 744, 3 Gray's Cas. 198.

<sup>15</sup> *Watt v. Trapp*, 2 Rich. Law (S. C.) 136; *Peters v. Little*, 95 Ga. 151; *Nicholls v. Wentworth*, 100 N. Y. 455; *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Bodfish v. Bodfish*, 105 Mass. 317.

<sup>16</sup> *Sears v. Hayt*, 37 Conn. 406; *Barker v. Clark*, 4 N. H. 380, 17 Am. Dec. 428; *Plimpton v. Converse*, 42 Vt. 712.

<sup>17</sup> *McKenzie v. Elliott*, 134 Ill. 156; *Webster v. City of Lowell*, 142 Mass. 324.

out taking any positive action to prevent its exercise which might be made the ground of a legal action by a person entitled to the right, does not, by the weight of authority, as well as of reason, prevent the acquisition of the right.<sup>18</sup> And if the efforts of the owner of the land to prevent the user have been successfully prevented by the claimant of the right, and such owner has not then sought legal protection, the user is to be regarded as with his acquiescence and uninterrupted.<sup>19</sup>

The user is not continuous if a period intervenes, before the completion of the statutory time, during which both the land in which the easement is claimed and that for the benefit of which it is asserted belong to one person.<sup>20</sup>

The requirement that the user be continuous does not involve any necessity that the right be exercised constantly for the statutory period, but rather that there be no abandonment of the use or interruption thereof by the owner of the land. Thus, a right of way may be acquired by prescription if there is an exercise of the right at the pleasure of the claimant, though this be at infrequent intervals,<sup>21</sup> and the right to interfere with the natural flow of a stream may be so acquired, though such interference is at times discontinued

<sup>18</sup> *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. Law, 605, 3 Gray's Cas. 213; *Kimball v. Ladd*, 42 Vt. 747; *Ferrell v. Ferrell*, 1 Baxt. (Tenn.) 329; *Cox v. Clough*, 70 Cal. 345; *McGeorge v. Hoffman*, 133 Pa. St. 381; *Okeson v. Patterson*, 29 Pa. St. 22; *Connor v. Sullivan*, 40 Conn. 26; *Jordan v. Land*, 22 S. C. 159; *Angus v. Dalton*, 3 Q. B. Div. 93, per Lush, J., 4 Q. B. Div. 172, 186, per Thesiger and Cotton, L. J. Contra, *Chicago & N. W. Ry. Co. v. Hoag*, 90 Ill. 339; *Powell v. Bagg*, 8 Gray (Mass.) 441, 69 Am. Dec. 262 (semble). See, also, *Conner v. Woodfill*, 126 Ind. 85, 22 Am. St. Rep. 568.

<sup>19</sup> *Connor v. Sullivan*, 40 Conn. 26.

<sup>20</sup> *Pierre v. Fernald*, 26 Me. 436, 46 Am. Dec. 573; *Mansur v. Blake*, 62 Me. 38; *Murphy v. Welch*, 128 Mass. 489; *Vossen v. Dautel*, 116 Mo. 379; *Stuyvesant v. Woodruff*, 21 N. J. Law, 133, 47 Am. Dec. 156.

<sup>21</sup> *Cox v. Forrest*, 60 Md. 74; *Bodfish v. Bodfish*, 105 Mass. 317. (1024)

in order to repair a dam, or owing to a temporary cessation of the purpose of the interference.<sup>22</sup>

#### § 449. Exclusiveness of user.

The user of another's land for the purpose of passage may be effective for the purpose of creating a right of way by prescription, although others use the land for the purpose of passage, if there is an assertion of a claim of user independent of such user by others.<sup>23</sup> So the fact that the owner, or others, by his permission, use the land for purposes of passage,<sup>24</sup> or that another person has a right of way by grant,<sup>25</sup> does not prevent the acquisition of a right of way on the same line by another person. But if the user by an individual is in common with and similar to that of the public at large, and without the assertion of any peculiar rights in himself, the individual cannot thereby acquire any private easement.<sup>26</sup>

#### § 450. Hostile character of user.

In order that a right of using another's land be acquired by lapse of time, the user must be hostile or adverse to the owner of the land,—that is, it must not be by the permission

<sup>22</sup> *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503; *Hesperia Land & Water Co. v. Rogers*, 83 Cal. 10; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Messinger's Appeal*, 109 Pa. St. 290; *Gerenger v. Summers*, 24 N. C. 229.

<sup>23</sup> *Cox v. Forrest*, 60 Md. 74; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *McKenzie v. Elliott*, 134 Ill. 156.

<sup>24</sup> *Wanger v. Hipple* (Pa.) 13 Atl. 81; *Webster v. City of Lowell*, 142 Mass. 324.

<sup>25</sup> *Ballard v. Demmon*, 156 Mass. 449.

<sup>26</sup> *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Prince v. Wilbourn*, 1 Rich. Law (S. C.) 58; *Plimpton v. Converse*, 44 Vt. 158; *Burnham v. McQuesten*, 48 N. H. 446; *Cobb v. Davenport*, 32 N. J. Law, 369.



of the latter, express or implied.<sup>27</sup> Furthermore, the user must have been such as to give rise to a right of action on the part of the owner, since, if he cannot interfere with the user, he should not be deprived thereby of any rights in the land.<sup>28</sup> But provided a right of action exists on account of the user of the land, the fact that there is, by such user, merely an infringement of the right of property, and no actual damage to the land, does not prevent the running of the prescriptive period.<sup>29</sup>

A user commencing by permission or license may become adverse by the landowner's withdrawal thereof, or by a repudiation of the owner's rights by the licensee.<sup>30</sup> Likewise, when the owner undertakes to confer upon another a perpetual interest in the land, but fails to do so in a valid manner, as when he makes an oral grant of an easement, the exercise of the easement by such other in accordance with

<sup>27</sup> *Parker v. Foote*, 19 Wend. (N. Y.) 309, 3 Gray's Cas. 187; *Morse v. Williams*, 62 Me. 445; *Demuth v. Amweg*, 90 Pa. St. 181; *Dexter v. Tree*, 117 Ill. 532; *Whaley v. Jarrett*, 69 Wis. 613, 2 Am. St. Rep. 764; *Thomas v. England*, 71 Cal. 456; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Conner v. Woodfill*, 126 Ind. 85, 22 Am. St. Rep. 568; *Conyers v. Scott*, 94 Ky. 123; *Lanier v. Booth*, 50 Miss. 410; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Esling v. Williams*, 10 Pa. St. 126.

<sup>28</sup> *Richard v. Hupp* (Cal.) 37 Pac. 920; *Whiting v. Gaylord*, 66 Conn. 337; *Mitchell v. City of Rome*, 49 Ga. 19; *Emery v. Raleigh & G. R. Co.*, 102 N. C. 210, 11 Am. St. Rep. 727; *Gilmore v. Driscoll*, 122 Mass. 199, 267; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243; *Burnham v. Kempton*, 44 N. H. 78; *Klein v. Gehrung*, 25 Tex. (Supp.) 232; *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470; *Carlisle v. Cooper*, 19 N. J. Eq. 256.

<sup>29</sup> *Dana v. Valentine*, 5 Metc. (Mass.) 8, 2 Gray's Cas. 61; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Parker v. Foote*, 19 Wend. (N. Y.) 309, 3 Gray's Cas. 187.

<sup>30</sup> *Eckerson v. Crippen*, 110 N. Y. 585; *Huston v. Bybee*, 17 Or. 140; *Pitzman v. Boyce*, 111 Mo. 387; *Thoemke v. Fiedler*, 91 Wis. 386.

the terms of the invalid grant cannot be regarded as permissive and in subordination to the rights of the landowner, but is in effect adverse to such rights.<sup>31</sup>

The user of a public highway by an individual cannot be effective as against the owner of the land on which the highway is located, so as to create a prescriptive right to a way in an individual using the highway, since the owner of the land cannot, while it is used as a highway, prevent passage thereon by such individual.<sup>32</sup> But such user may become adverse upon the abandonment of the highway.<sup>33</sup>

The fact that the land is in the possession of a tenant of the owner of the fee will not, it seems, prevent the creation of the right by lapse of time as against the latter, if he could, by reason of his reversionary rights, have brought suit, at any time within the statutory period, against the person exercising the user.<sup>34</sup> It has been decided that uninclosed woodland may be the subject of an adverse user for the purpose of a right of way.<sup>35</sup>

<sup>31</sup> *Jewett v. Hussey*, 70 Me. 433; *Arbuckle v. Ward*, 29 Vt. 43; *McKenzie v. Elliott*, 134 Ill. 156; *Legg v. Horn*, 45 Conn. 415; *Talbott v. Thorn*, 91 Ky. 417; *Stearns v. Janes*, 12 Allen (Mass.) 582; *Parish v. Kaspere*, 109 Ind. 586. But see *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479.

<sup>32</sup> *Webster v. City of Lowell*, 142 Mass. 324; *Wheeler v. Clark*, 58 N. Y. 267; *Whaley v. Stevens*, 27 S. C. 549.

<sup>33</sup> *Black v. O'Hara*, 54 Conn. 17.

<sup>34</sup> *Cross v. Lewis*, 2 Barn. & C. 686, 3 Gray's Cas. 131; *Reimer v. Stuber*, 20 Pa. St. 458, 3 Gray's Cas. 198. See *Ward v. Warren*, 82 N. Y. 265; *Gale, Easements*, 192, 199. And compare *Pentland v. Keep*, 41 Wis. 490.

In *Ballard v. Demmon*, 156 Mass. 449, a disability to sue on account of an outstanding term for years was regarded as similar in effect to a personal disability, and so sufficient to affect the running of the prescriptive period only if the term existed at the time the right of action on account of the user of the land accrued.

<sup>35</sup> *Worrall v. Rhoads*, 2 Whart. (Pa.) 427; *Reimer v. Stuber*, 20 Pa. St. 458, 3 Gray's Cas. 198. This has, however, been changed by statute in Pennsylvania. *Kurtz v. Hoke*, 172 Pa. St. 165. That

The fact that the person claiming the right, during the statutory period, offered to purchase the easement, may show that the user is not adverse,<sup>36</sup> but does not necessarily do so,<sup>37</sup> it being a question for the jury on all the circumstances.

It is frequently stated that the hostile user of the land must be known to the owner;<sup>38</sup> but, provided the user is of such a character as to involve a plain assertion of the right to use the land, it seems exceedingly doubtful whether the claimant's rights could be affected by the failure of the owner to notice such user, owing to his absence from the neighborhood, or to other causes.<sup>39</sup>

#### § 451. Specific rights.

A right of way over another's land may be acquired by prescription,<sup>40</sup> and the doctrine is more frequently applied in this connection than in any other. Rights to appropriate the water of a stream in excess of one's natural rights may also be thus acquired as against lower riparian proprietors.<sup>41</sup>

there is a presumption that the use of such land is not adverse, see *Sims v. Davis*, Cheves (S. C.) 1; *Gibson v. Durham*, 3 Rich. Law (S. C.) 85.

<sup>36</sup> *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156.

<sup>37</sup> *Kana v. Bolton*, 36 N. J. Eq. 21.

<sup>38</sup> *Wallace v. Fletcher*, 30 N. H. 434; *Peterson v. McCullough*, 50 Ind. 35; *Cobb v. Davenport*, 32 N. J. Law, 369; *Zigefoose v. Zigefoose*, 69 Iowa, 391; *American Co. v. Bradford*, 27 Cal. 360; *Richard v. Hupp* (Cal.) 37 Pac. 920; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Hannefin v. Blake*, 102 Mass. 297.

<sup>39</sup> See, to this effect, *Reimer v. Stuber*, 20 Pa. St. 458, 59 Am. Dec. 744, 3 Gray's Cas. 198; *Perrin v. Garfield*, 37 Vt. 304; *Ward v. Warren*, 82 N. Y. 265. See, also, *Cook v. Gammon*, 93 Ga. 298.

<sup>40</sup> *Aaron v. Gunnels*, 68 Ga. 528; *Jones v. Percival*, 5 Pick. (Mass.) 485, 16 Am. Dec. 415; *Garnett v. City of Slater*, 56 Mo. App. 207; *Arnold v. Cornman*, 50 Pa. St. 361; *Talbott v. Thorn*, 91 Ky. 417; *Cheney v. O'Brien*, 69 Cal. 199; *Everedge v. Alexander*, 75 Ga. 858.

<sup>41</sup> *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Horn v. Miller*, 142 Pa. St. 557; *Whitney v. Wheeler Cotton Mills*, 151 (1028)

The right to dam or obstruct the water of a stream so as to flood the land of another may also be thus acquired,<sup>42</sup> as may the right to pollute the water.<sup>43</sup> A right of *profit a prendre* may be established by the taking of profits for the prescriptive period.<sup>44</sup> So one may, by prescription, have a right to the maintenance of a fence by the owner of adjoining land,<sup>45</sup> or to conduct a business on one's land which pollutes the atmosphere, to the injury of the land adjoining,<sup>46</sup> and one may so acquire the right to extend eaves of a roof, or a cornice, over other land.<sup>47</sup>

There are, on the other hand, some easements which cannot be acquired by prescription, owing to the fact that the

Mass. 396; Coonradt v. Hill, 79 Cal. 587; Olney v. Fenner, 2 R. I. 211, 57 Am. Dec. 711; Shreve v. Voorhees, 3 N. J. Eq. 25; Kuhlman v. Hecht, 77 Ill. 570; Fankboner v. Corder, 127 Ind. 164; Barnes v. Haynes, 13 Gray (Mass.) 188, 74 Am. Dec. 629; Smith v. Putnam, 62 N. H. 369; Krier's Private Road, 73 Pa. St. 109; Ferrell v. Ferrell, 1 Baxt. (Tenn.) 329; Boyd v. Woolwine, 40 W. Va. 282.

<sup>42</sup> Williams v. Nelson, 23 Pick. (Mass.) 141; Emery v. Raleigh & G. R. Co., 102 N. C. 210, 11 Am. St. Rep. 727; Mueller v. Fruen, 36 Minn. 273; Vail v. Mix, 74 Ill. 127; Turner v. Hart, 71 Mich. 128, 15 Am. St. Rep. 243; Alcorn v. Sadler, 71 Miss. 634; Hammond v. Zehner, 21 N. Y. 118; McGeorge v. Hoffman, 133 Pa. St. 381; Haas v. Choussard, 17 Tex. 588; Perrin v. Garfield, 37 Vt. 304.

<sup>43</sup> Crossley v. Lightowler, 2 Ch. App. 478; Crosby v. Bessey, 49 Me. 539; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Gladfelter v. Walker, 40 Md. 1; Gould, Waters (3d Ed.) §§ 345, 346.

<sup>44</sup> See Melvin v. Whiting, 10 Pick. (Mass.) 295, 13 Pick. 185, 3 Gray's Cas. 184, 186; Carter v. Tinicum Fishing Co., 77 Pa. St. 310; Cobb v. Davenport, 32 N. J. Law, 369.

<sup>45</sup> Castner v. Riegel, 54 N. J. Law, 498; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Adams v. Van Alstyne, 25 N. Y. 232.

<sup>46</sup> Sturges v. Bridgman, 11 Ch. Div. 852, 2 Gray's Cas. 57; Dana v. Valentine, 5 Metc. (Mass.) 8, 2 Gray's Cas. 61.

<sup>47</sup> Cherry v. Stein, 11 Md. 1; Grace Methodist Episcopal Church v. Dobbins, 153 Pa. St. 294, 34 Am. St. Rep. 706. But prescription can give no right to have branches overhang adjoining land. Lemon v. Webb [1894] 3 Ch. 1.

owner of the land is not in a position to prevent the exercise of the user claimed, or to sue on account thereof, and consequently the fact that he does not do so is no evidence of acquiescence on his part. On this principle it has been decided that the appropriation of an excessive quantity of water from a watercourse for the statutory period by a lower riparian proprietor does not give him any right to continue such appropriation as against an upper proprietor who may thereafter desire to use water therefrom, since the latter had no means of preventing such excessive appropriation other than appropriating the water himself.<sup>48</sup> One cannot acquire by prescription a right to water percolating from other land to his land, since the owner of the land from which it percolates is not in a position to prevent its percolation.<sup>49</sup> Nor can the owner of a lower tenement acquire by length of user, as against the upper tenement, a right to the flow of surface water.<sup>50</sup> So, the owner of the upper tenement, who has, by the common law, no natural right to have surface water flow from his land on the lower tenement, cannot acquire such right by the fact that the owner of the latter does not prevent such flow until the prescriptive period has elapsed, since such flow gives no right of action.<sup>51</sup> In case, however,

<sup>48</sup> *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590, 2 Gray's Cas. 119; *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 300; *Thurber v. Martin*, 2 Gray (Mass.) 394, 2 Gray's Cas. 155; *Pratt v. Lamson*, 2 Allen (Mass.) 275, 288; *Parker v. Hotchkiss*, 25 Conn. 321.

<sup>49</sup> *Chasemore v. Richards*, 7 H. L. Cas. 349; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Frazier v. Brown*, 12 Ohio St. 294; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Village of Delhi v. Youmans*, 50 Barb. (N. Y.) 316. See *Chatfield v. Wilson*, 28 Vt. 49.

<sup>50</sup> *Wood v. Waud*, 3 Exch. 748; *Greatrex v. Hayward*, 8 Exch. 291; *Broadbent v. Ramsbotham*, 11 Exch. 602.

<sup>51</sup> *Parks v. City of Newburyport*, 10 Gray (Mass.) 28; *White v. Chapin*, 12 Allen (Mass.) 516; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. Compare *Ross v. Mackeney*, 46 N. J. Eq. 140.



the owner of the upper tenement causes the water to flow on the lower tenement in a particular channel, the lower proprietor can prevent such action, and consequently his failure so to do may be regarded as acquiescence therein, which confers the right if continued for the statutory period.<sup>52</sup> Where the civil-law rule, giving the proprietor of the upper tenement a natural right to have his surface water flow off on the lower tenement, controls, he may lose this right by submitting to the obstruction of such flow for the prescriptive period.<sup>53</sup>

One cannot, in this country, by the maintenance of windows in one's building overlooking adjacent land for the statutory period, acquire an easement of light and air in such land, since this involves no injury to the land, or diminution of the value of the beneficial interest therein, and consequently gives no right of action to the landowner.<sup>54</sup> Likewise, the right of support for a building by another building or by adjacent land cannot, by the weight of authority in this country, be acquired by prescription, since not only is the exercise of the right not one which causes injury to the supporting land or building, but the dependence of a building on such support is a fact which is in most cases not discoverable until the support is withdrawn.<sup>55</sup> In Eng-

<sup>52</sup> *White v. Chapin*, 12 Allen (Mass.) 516; *Schnitzius v. Bailey*, 48 N. J. Eq. 409. See *Leidlein v. Meyer*, 95 Mich. 586.

<sup>53</sup> *Louisville & N. Ry. Co. v. Mossman*, 90 Tenn. 157.

<sup>54</sup> *Parker v. Foote*, 19 Wend. (N. Y.) 309, 3 Gray's Cas. 187; *Hubbard v. Town*, 33 Vt. 295, Finch's Cas. 840; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111; *Lahere v. Luckey*, 23 Kan. 534; *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Haverstick v. Sipe*, 33 Pa. St. 368; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629; *Pierre v. Fernald*, 26 Me. 436, 46 Am. Dec. 573; *Napier v. Bulwinkle*, 5 Rich. Law (S. C.) 311. *Contra*, *Clawson v. Primrose*, 4 Del. Ch. 643.

<sup>55</sup> *Richart v. Scott*, 7 Watts (Pa.) 460; *Mitchell v. City of Rome*,

land, on the other hand, the right of support may be thus acquired.<sup>56</sup> There are several decisions in this country that a right in the use of a party wall may be acquired by prescription,<sup>57</sup> but this view, while clearly correct when it involves the placing of beams or other parts of a building in or on a wall upon adjoining land, is, it seems, in other cases not involving any occupation of the space above such land, not reconcilable with the principle that the user, to be adverse, must be actionable,<sup>58</sup> nor with the decisions above referred to, that a right of support for buildings from adjoining land or buildings cannot be acquired by prescription.

### § 452. Rights in the public.

A right to use land for highway purposes may usually be acquired by the public by its use for such purposes under a claim of right for the statutory period of limitation as to land. Such mode of acquisition of highway rights is ordinarily referred to as "prescription,"<sup>59</sup> and is generally based on the theory that such user of the land raises the presumption of a dedication, or of an appropriation of the

49 Ga. 19, 15 Am. Rep. 669; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Handlan v. McManus*, 42 Mo. App. 551; *Sullivan v. Zeiner*, 98 Cal. 346. See *Gilmore v. Driscoll*, 122 Mass. 199, 207. But see *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, 25 Am. Dec. 524.

<sup>56</sup> *Dalton v. Angus*, 6 App. Cas. 740; *Lemaitre v. Davis*, 19 Ch. Div. 281.

<sup>57</sup> *Schile v. Brockhahus*, 80 N. Y. 614; *Barry v. Edlavitch*, 84 Md. 95; *Dowling v. Hennings*, 20 Md. 179; *Brown v. Werner*, 40 Md. 15; *McVey v. Durkin*, 136 Pa. St. 418.

<sup>58</sup> See *McLaughlin v. Cecconi*, 141 Mass. 252; *Whiting v. Gaylord*, 66 Conn. 337.

<sup>59</sup> If prescription is to be regarded as necessarily based on the presumption of a grant, the term is not accurate as applied to the case of a highway, since highway rights are created, not by grant, but by dedication. See *Angell, Highways*, § 131. The fiction of a grant can, however, not be regarded as an integral part of the law of prescription in this country at the present day.

land by a statutory proceeding.<sup>60</sup> In some states there are statutory provisions in regard to the effect of user by the public as establishing a highway.<sup>61</sup> In a few states, even apart from statute, the mere user of the land by the individuals constituting the public, without any adoption of the way by the public authorities, is insufficient to create a highway.

The user of the land by the public must not be by permission merely of the owner of the land, but must be under a claim of right,<sup>62</sup> and the fact that the owner of the land maintains gates across the way is regarded as strong evidence that the use by the public is merely permissive.<sup>63</sup> The fact, moreover, that the land is vacant and uninclosed has been regarded as strong, and sometimes as conclusive, proof that the user was permissive.<sup>64</sup> The user must be in a fixed and definite line for the whole of the statutory period.<sup>65</sup>

<sup>60</sup> *Reed v. Inhabitants of Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; 3 Gray's Cas. 808; *Onstott v. Murray*, 22 Iowa, 457; *Willey v. Portsmouth*, 35 N. H. 303; *Howard v. State*, 47 Ark. 431; *Com. v. Cole*, 26 Pa. St. 187; *Daniels v. People*, 21 Ill. 439; *Schwerdtle v. Placer County*, 108 Cal. 589; *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513; 3 Kent's Comm. 451; *Elliott, Roads & S. c.* 6.

<sup>61</sup> See *Freshour v. Hihn*, 99 Cal. 443; *Strong v. Makeever*, 102 Ind. 578; *Elfelt v. Stillwater St. Ry. Co.*, 53 Minn. 68; *Speir v. Town of New Utrecht*, 121 N. Y. 420; *Stewart v. Frink*, 94 N. C. 487; *Com. v. Kelly*, 8 Grat. (Va.) 632; *Dicken v. Liverpool Salt & Coal Co.*, 41 W. Va. 511.

<sup>62</sup> *Plummer v. Ossipee*, 59 N. H. 55; *Hougham v. Harvey*, 40 Iowa, 634; *White v. Wiley*, 59 Hun, 618, 13 N. Y. Supp. 205; *Sharp v. Mynatt*, 1 Lea (Tenn.) 375; *City of Ottawa v. Yentzer*, 160 Ill. 509.

<sup>63</sup> *Harper v. State*, 109 Ala. 66; *Smithers v. Fitch*, 82 Cal. 153; *Johnson v. Stayton*, 5 Har. (Del.) 448; *Shellhouse v. State*, 110 Ind. 509; *Jones v. Phillips*, 59 Ark. 35.

<sup>64</sup> *City of Ottawa v. Yentzer*, 160 Ill. 509; *Hutto v. Tindall*, 6 Rich. Law (S. C.) 396; *Cunningham v. San Saba County*, 1 Tex. Civ. App. 480; *Graham v. Hartnett*, 10 Neb. 517; *State v. Horn*, 35 Kan. 717. See *Ely v. Parsons*, 55 Conn. 83.

<sup>65</sup> *Friel v. People*, 4 Colo. App. 259; *Gentleman v. Soule*, 32 Ill. 271, 83 Am. Dec. 264; *Schroeder v. Village of Onekama*, 95 Mich. 25; *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489.

## CHAPTER XXV.

### ACCRETION.

- § 453. General considerations.
- 454. Apportionment of accretions.
- 455. Islands.

The owner of land upon a stream or body of water is entitled to such other land as may be added thereto by "accretion,"—that is, by the gradual and imperceptible formation of land adjacent thereto by alluvial deposits. Such owner, on the other hand, loses so much of his land as may be gradually washed away, or upon which the water may gradually encroach. A sudden and perceptible change does not affect the ownership of a particular part of the soil.

An island formed by alluvial deposits belongs to the owner of the land on which it is formed.

- § 453. General considerations.

When the line between water and the land bordering thereon is changed by the gradual deposit of alluvial soil upon the margin of the water, or by the gradual recession of the water, the owner of the land becomes entitled to the new land thus formed;<sup>1</sup> and, conversely, in case land bordering

<sup>1</sup> *Rex v. Yarborough*, 3 Barn. & C. 91; *Gifford v. Yarborough*, 5 Bing. 163, 3 Gray's Cas. 9; *Coulthard v. Stevens*, 84 Iowa, 241, 35 Am. St. Rep. 304, and note; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178; *St. Louis, I. M. & S. Ry. Co. v. Ramsey*, 53 Ark. 314, 22 Am. St. Rep. 195; *Saunders v. New York Cent. & Hudson River R. Co.*, 144 N. Y. 75; *Linthicum v. Coan*, 64 Md. 439, 454; *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 206; *Gill v. Lydick*, 40 Neb. 508; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267, and note; *Chi-* (1034)

on water is gradually washed away, or the water otherwise encroaches upon the land, the owner loses the land which has thus been encroached on by the water, unless he retains its ownership as having previously been entitled to the land under the water.<sup>2</sup> These principles may be otherwise expressed by the statement that, if a person owns the land under a particular body of water, or under a particular portion thereof, or land adjoining such water, he continues to own the land answering to such description, although, owing to a gradual change in the location of the water, the land so described does not remain the same. So, if a stream bounded on both sides by land belonging to A., who also owns the bed of the stream, gradually changes its bed so as to encroach upon the land of B., the land covered by the stream in its new location ceases to belong to B., and becomes the property of A.<sup>3</sup> And if the middle line of a stream is the boundary between the lands of different owners, it remains the boundary, although the line itself changes as a result of a gradual change in the location of the stream.<sup>4</sup> A different rule has, however, been applied in the case of land bounded on a private pond belonging exclusively to another, it being held that the boundary is in such case a fixed line, and does not follow changes in the margin of the water.<sup>5</sup>

*Cago Dock & Canal Co. v. Kinzie*, 93 Ill. 415; *Minto v. Delaney*, 7 Or. 337; *Fillmore v. Jennings*, 78 Cal. 634.

<sup>2</sup> *In re Hull & Selby Ry. Co.*, 5 Mees. & W. 327, 3 Gray's Cas. 15; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450; *Wilson v. Shiveley*, 11 Or. 215; *Bouvier v. Stricklett*, 40 Neb. 792; *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 23; *Town of East Hampton v. Kirk*, 84 N. Y. 218; *Gould, Waters*, § 155.

<sup>3</sup> *Foster v. Wright*, 4 C. P. Div. 438, 3 Gray's Cas. 17; *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48.

<sup>4</sup> *Nebraska v. Iowa*, 143 U. S. 359; *Niehaus v. Shepherd*, 26 Ohio St. 40; *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48; *Gerrish v. Clough*, 48 N. H. 9.

<sup>5</sup> *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270, 3 Gray's Cas.



The title to the land acquired by accretion is subject to any incumbrances or rights in other persons to which the land to which the accretion is made is subject. Consequently it may become subject to a lien,<sup>6</sup> an easement,<sup>7</sup> an outstanding lease,<sup>8</sup> and, if the statute of limitations has partially run against the owner's right to recover the land originally existing, his right to recover the newly-formed land is liable to be barred within the same time.<sup>9</sup>

The owner of an island is entitled to land added thereto by accretion to the same extent as the owner of land on the bank or shore of the mainland.<sup>10</sup> And in case accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact.<sup>11</sup>

The rules above stated to the effect that the ownership follows changes in the location of the water do not apply in the case of sudden and perceptible changes, and such changes, whether the land encroaches on the water or the water encroaches on the land, effect no change in the ownership of any particular portion of the soil.<sup>12</sup> And so, if the middle

437. See *Eddy v. St. Mars*, 53 Vt. 462; *Noyes v. Collins*, 92 Iowa, 566.

<sup>6</sup> *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91.

<sup>7</sup> *Town of Freedom v. Norris*, 128 Ind. 377; *People v. Lambier*, 5 Denio (N. Y.) 9, 47 Am. Dec. 273.

<sup>8</sup> *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91; *Williams v. Baker*, 41 Md. 523.

<sup>9</sup> *Bellefontaine Improvement Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269; *Benne v. Miller*, 149 Mo. 228.

<sup>10</sup> *St. Louis v. Rutz*, 138 U. S. 226; *Benson v. Morrow*, 61 Mo. 345; *Bigelow v. Hoover*, 85 Iowa, 161, 39 Am. St. Rep. 296; *Naylor v. Cox*, 114 Mo. 232.

<sup>11</sup> *Hahn v. Dawson*, 134 Mo. 581; *Bigelow v. Hoover*, 85 Iowa, 161, 19 Am. St. Rep. 296; *Bellefontaine Improvement Co. v. Niedringhaus*, 72 Am. St. Rep. 283, note.

<sup>12</sup> *St. Louis v. Rutz*, 138 U. S. 226; *Nebraska v. Iowa*, 143 U. S. 359; *Vogelsmeier v. Prendergast*, 137 Mo. 271; *Coulthard v. Davis*, 101 Iowa, 625; *Den d. Lynch v. Allen*, 20 N. C. 62, 32 Am. Dec. 672; *Bouvier v. Stricklett*, 40 Neb. 792.

line of a stream is the boundary line between two owners, the boundary line remains the same, although, owing to a sudden change in the location of the stream, that line ceases to be the middle line of the stream.<sup>13</sup> The distinction between the gradual and the sudden change, on which the difference in the resulting rights is based, is dependent on the question whether, in the particular case, the actual process of change is perceptible, and it is not to be regarded as sudden, rather than gradual, merely because, at distinct periods of time, one may be able to see that a change has taken place.<sup>14</sup>

§ 454. **Apportionment of accretions.**

When land is formed by accretion adjacent to land owned by several contiguous riparian or littoral owners, the rule usually adopted for the apportionment of the land so formed is to divide the new shore line among the proprietors in proportion to their respective rights in the old shore line, and to draw lines from the points of division thus made in the new shore line to the points at which the old shore line is intersected by the boundaries separating the proprietors.<sup>15</sup> A different rule has, however, been adopted in at least one state, as applicable when the ownership of the bed of the

<sup>13</sup> *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 5 Am. St. Rep. 545; *Bouvier v. Stricklett*, 40 Neb. 792; *Rees v. McDaniel*, 115 Mo. 145.

<sup>14</sup> *Jefferis v. East Omaha Land Co.*, 134 U. S. 178; *Nebraska v. Iowa*, 143 U. S. 359; *Coulthard v. Stevens*, 84 Iowa, 241, 35 Am. St. Rep. 304; *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 24; *Camden & Atlantic Land Co. v. Lippincott*, 45 N. J. Law, 405; *Halsey v. McCormick*, 18 N. Y. 147; *Saunders v. New York Cent. & Hudson River R. Co.*, 144 N. Y. 75.

<sup>15</sup> *Inhabitants of Deerfield v. Arms*, 17 Pick. (Mass.) 41, 3 Gray's Cas. 22; *Batchelder v. Keniston*, 51 N. H. 496, 12 Am. Rep. 143; *Johnston v. Jones*, 1 Black (U. S.) 209. See *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206.

river is in the riparian proprietors, to the effect that their boundary lines are to be extended from the old shore line to the new line at right angles to the center line of the river.<sup>16</sup> Whatever be the general rule adopted in this regard in a particular jurisdiction, it will, it seems, be varied in particular cases in view of peculiar circumstances which may arise.<sup>17</sup>

### § 455. Islands.

An island, when formed in a stream or body of water by the deposit of alluvial matter therein, belongs to the owner of the land beneath the water, on which the island is formed, whether such owner be the state or an individual.<sup>18</sup> So, if the island is on both sides of a line dividing the lands of different owners, the island belongs to both owners.<sup>19</sup> An

<sup>16</sup> *Miller v. Hepburn*, 8 Bush (Ky.) 326, 3 Gray's Cas. 26.

In Illinois it has been decided that the thread or middle line of the river is to be divided proportionately between the riparian proprietors, and the boundary lines are to be extended to the division points so made. *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 866.

<sup>17</sup> *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 866; *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701; *Batchelder v. Keniston*, 51 N. H. 496, 12 Am. Rep. 143.

This question of the apportionment of alluvion between the different riparian owners is analogous to that of the apportionment of the "flats" or shore among the owners of the uplands, in cases in which the state has relinquished the ownership of such flats. See Gould, *Waters*, § 162; *Com. v. City of Roxbury*, 9 Gray (Mass.) 451, reporter's note 521; *Wonson v. Wonson*, 14 Allen (Mass.) 85; *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701.

<sup>18</sup> *Perkins v. Adams*, 132 Mo. 131; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450; *St. Louis v. Rutz*, 138 U. S. 226; *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 212; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; *McCullough v. Wall*, 4 Rich. Law (S. C.) 68, 53 Am. Dec. 715; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112.

<sup>19</sup> *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; 3 Kent's Comm. 428.

island formed by a sudden change in the course of a stream, or by a sudden encroachment of the sea, the soil remaining as before, except that it is separated by a channel from the main land, does not change its ownership.<sup>20</sup>

<sup>20</sup> Trustees of Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 544; Bonewits v. Wygant, 75 Ind. 41; Gould, Waters, § 166.

## CHAPTER XXVI.

### ESTOPPEL.

§ 456. Transfer of after-acquired title.

457. Estoppel by representation.

In this country, a conveyance of land, with a covenant of warranty, and occasionally with other covenants, is regarded as passing any title or interest, which the scope of such conveyance, which the grantor may thereafter acquire. Such a doctrine has never been recognized in England except in the case of feoffments, fines, and recoveries, and, to a limited extent, leases.

The doctrine of estoppel by representation, so far as it may prevent the owner of land, who represents, either expressly or tacitly, the title to be in another, from thereafter denying the truth of the representation, in effect transfers the title. In some states the doctrine is applicable in connection with land only when the representation was fraudulent, and then only in equity.

§ 456. Transfer of after-acquired title.

At common law, a transfer of land by feoffment, fine, or common recovery operated to transfer to the transferee all estates or interests which might be subsequently acquired by the transferrer, in case he did not, at the time of making the assurance, have such an estate as he purported to transfer.<sup>1</sup>

<sup>1</sup> Bigelow, Estoppel (5th Ed.) 385, 414-419; Rawle, Covenants for Title (5th Ed.) § 243; Doe d. Christmas v. Oliver, 10 Barn. & C. 181, 3 Gray's Cas. 739; Sturgeon v. Wingfield, 15 Mees. & W. 224, 3 Gray's Cas. 745.



A lease had a partially similar effect, in that, if the lessor did not have any title at the time of making the lease, a title subsequently obtained by him passed thereunder, though this was not the case if he had some title at the date of the lease.<sup>2</sup> Other conveyances than those mentioned had no such effect of passing an after-acquired title at common law, nor have they in England at the present day.<sup>3</sup> It is, however, recognized in England, as in this country, that, if a conveyance purports to transfer a certain estate, whether this appears from recitals, covenants, or any other part of the conveyance, the grantor himself is estopped thereafter to deny that such an estate did pass, or to claim the land under a title subsequently acquired by him.<sup>4</sup>

To support this view, there is not, it is evident, any necessity for holding that the subsequently-acquired title passes to the grantee, the estoppel being merely personal as against the grantor, and being but an application of the common-law principle that a party to a deed cannot contradict or disprove any declaration or averment therein. In this country, however, there are many decisions to the effect not only that the

<sup>2</sup> Co. Litt. 47b; Bigelow, Estoppel, 390, 420; Williams, Real Prop. (18th Ed.) 476; Doe d. Strode v. Seaton, 2 Crompt., M. & R. 728; Trevivan v. Lawrence, 1 Salk. 276.

<sup>3</sup> Williams, Real Prop. (18th Ed.) 476; Rawle, Covenants for Title (5th Ed.) §§ 244, 246, 262; Bigelow, Estoppel, 423 et seq.; 2 Smith, Lead. Cas. 839; Right v. Bucknell, 2 Barn. & Adol. 278, 3 Gray's Cas. 741; General Finance, Mortgage & Discount Co. v. Liberator Permanent Benefit Bldg. Soc., 10 Ch. Div. 15.

<sup>4</sup> Rawle, Covenants for Title (5th Ed.) §§ 245, 255; Bigelow, Estoppel, 395; Goodtitle v. Bailey, Cowp. 601; 2 Smith, Lead. Cas. Eq. 854; Right v. Bucknell, 2 Barn. & Adol. 278, 3 Gray's Cas. 741; Van Rennselaer v. Kearney, 11 How. (U. S.) 297; Clark v. Baker, 14 Cal. 629, 76 Am. Dec. 449; Taggart v. Risley, 4 Or. 235; Wells v. Steckelberg, 52 Neb. 597; Reynolds v. Cook, 83 Va. 817, 5 Am. St. Rep. 317; Pendill v. Marquette County Agricultural Soc., 95 Mich. 491.

grantor in a conveyance is estopped to deny that it passed the estate which it purported to pass, but also that it actually passes, by way of estoppel, any title which the grantor may thereafter acquire in the land, if this is within its apparent scope, and especially if it contains certain covenants of title.<sup>5</sup> There are, moreover, in a number of states, statutory provisions to this effect.<sup>6</sup>

For most purposes, the question whether there is merely a personal estoppel on the grantor to assert the after-acquired title, or whether such title actually passes under the conveyance, is immaterial. The distinction between the two views is, however, important in two respects: First, as between the grantor and grantee, the effect of the application of the rule, without exception, that a conveyance containing covenants of title operates to pass an after-acquired estate, would be that a covenantee would be compelled to take such an estate, and would not have the option of refusing so to do, and of recovering full damages on the covenant. Recognizing the injustice of such a result, it has usually been held that the covenantee has such an option, and is not compelled to accept the after-acquired estate in partial or total satisfaction of the covenant.<sup>7</sup> The other and more important result of the distinction is that, if the covenant effects merely a personal estoppel on the covenantor, a person to whom he subsequently conveys the after-acquired estate is not affected thereby, while, if the covenant operates as an actual

<sup>5</sup> Rawle, *Covenants for Title* (5th Ed.) § 248, and the numerous cases there cited; Bigelow, *Estoppel*, 429; 2 Smith, *Lead. Cas. Eq.* 338; 11 *Am. & Eng. Enc. Law*, 418.

<sup>6</sup> 1 Stimson, *Am. St. Law*, § 1454; Rawle, *Covenants for Title* (5th Ed.) § 249.

<sup>7</sup> Rawle, *Covenants for Title* (5th Ed.) § 258; Bigelow, *Estoppel*, 435; *Blanchard v. Ellis*, 1 Gray (Mass.) 193, 3 Gray's *Cas.* 755; *Tucker v. Clark*, 2 Sandf. Ch. (N. Y.) 96; *Burton v. Reeds*, 20 *Ind.* 87; *Noonan v. Ilesley*, 21 *Wis.* 139.

transfer of the subsequently-acquired estate, it does so as against any person to whom the covenantor attempts to convey such estate;<sup>8</sup> and this it does, it has been held in some cases, although such subsequent grantee is a purchaser for value, and without actual notice of the prior transfer, or any convenient means of acquiring notice. These decisions can more conveniently be considered hereafter in connection with the recording acts, to the spirit and policy of which they seem to be opposed.<sup>9</sup>

Many of the decisions which adopt the view that the conveyance operates to transfer the after-acquired title are based upon the theory that circuity of action is thereby avoided, the title itself being given to the grantee, instead of compelling him to sue for damages caused by the want of such title. But, as before stated, so far as the estoppel of the grantor himself is concerned, the presence of a covenant is immaterial;<sup>10</sup> and, as shown by an able writer, even when there are covenants, the estoppel frequently operates, although there is no right of action on a covenant.<sup>11</sup> This theory, therefore, however satisfactory it may be in many cases, does not serve to explain the decisions as a whole, and, as

<sup>8</sup> Rawle, *Covenants for Title* (5th Ed.) § 259; Bigelow, *Estoppel*, 413 et seq.

<sup>9</sup> Post, § 476.

<sup>10</sup> See authorities cited ante, note 4.

<sup>11</sup> Rawle, *Covenants for Title* (5th Ed.) § 251, where the following cases in which the estoppel has been held to act in the absence of any liability on the covenants are enumerated: (1) When the estoppel is sought to be enforced against a purchaser of the subsequently-acquired title, and not against the grantor himself; (2) when a married woman is estopped (in some states) to claim after-acquired property, though not liable on the covenant; (3) when the state is held to be estopped, though not liable on the covenant; (4) when the grantor is estopped, though exempt from liability on the covenant, owing to a discharge in bankruptcy; and (5) when he is estopped, though the claim on the covenant is barred by limitations.

stated by the same authority, the only satisfactory theory on which they can be explained is that they are merely applying under common-law forms, the equitable principle that, where one purports to convey a good title to another, and afterwards acquires the same land under another title, he may be compelled to convey to such other the title so acquired,—a rule which, however, was never enforced in equity as against a *bona fide* purchaser from the grantor of the land so subsequently acquired.<sup>12</sup>

In pursuance of the theory, frequently asserted, that the estoppel arises in a particular case from the presence of a covenant in the conveyance, and to prevent circuity of action, the cases sometimes distinguish as between particular covenants in this respect. Thus, a covenant of warranty is always regarded as effective for this purpose,<sup>13</sup> frequently as a result of a mistaken application of the doctrine of warranty at common law, and the same effect has been given to a covenant for quiet enjoyment,<sup>14</sup> while it has, in some states, been denied to a covenant for seisin or for good right to convey.<sup>15</sup>

There can be no estoppel as to an after-acquired title when the conveyance undertakes to transfer merely such an estate or

<sup>12</sup> Rawle, *Covenants for Title* (5th Ed.) § 264.

<sup>13</sup> *Doe d. Potts v. Roe*, 3 *Houst. (Del.)* 369, 11 *Am. Rep.* 757; *Childs v. McChesney*, 20 *Iowa*, 431, 89 *Am. Dec.* 545; *Knight v. Thayer*, 125 *Mass.* 25; *Morris v. Jansen*, 99 *Mich.* 436; *Moore v. Rake*, 26 *N. J. Law*, 574; *Broadwell v. Phillips*, 30 *Ohio St.* 255; *Johnson v. Brauch*, 9 *S. D.* 116; *Raines v. Walker*, 77 *Va.* 95; *Foster v. Hackett*, 112 *N. C.* 546; *Walton v. Follansbee*, 131 *Ill.* 147.

<sup>14</sup> *Smith v. Williams*, 44 *Mich.* 240; *Long Island R. Co. v. Conklin*, 29 *N. Y.* 572. See *Taggart v. Risley*, 4 *Or.* 235.

<sup>15</sup> *Allen v. Sayward*, 5 *Me.* 227, 17 *Am. Dec.* 221; *Doane v. Willcutt*, 5 *Gray (Mass.)* 333, 66 *Am. Dec.* 369; *Chauvin v. Wagner*, 18 *Mo.* 531. *Contra*, *Wightman v. Reynolds*, 24 *Miss.* 675. And see *Irvine v. Irvine*, 9 *Wall. (U. S.)* 618.



interest as the grantor has,<sup>16</sup> and the fact that such a conveyance contains covenants for title does not change its character in this respect.<sup>17</sup> If the conveyance is not of a limited interest merely, or of such interest only as the grantor has, the fact that the covenant is special—that is, against the acts only of the grantor and those claiming under him—does not affect its operation by way of estoppel.<sup>18</sup>

### § 457. Estoppel by representation.

In connection with the law of land there is frequent occasion for the application of the familiar principle that one who, by his words or actions, represents a certain state of facts to be true, and thereby induces another to act to his detriment, is precluded from thereafter denying the existence of such a state of facts. So it has frequently been decided that if one, having title to land, openly disclaims any rights therein,<sup>19</sup> or fails to assert his rights,<sup>20</sup> and thereby causes one, ignorant of the true state of the title, to purchase the land from a third person, he cannot thereafter assert any claim to

<sup>16</sup> *Quivey v. Baker*, 37 Cal. 465; *Benneson v. Aiken*, 102 Ill. 284, 40 Am. Rep. 592; *Harriman v. Gray*, 49 Me. 537; *Fay v. Wood*, 65 Mich. 390; *Gibson v. Chouteau*, 39 Mo. 536; *Perrin v. Perrin*, 62 Tex. 477; *Jourdain v. Fox*, 90 Wis. 99.

<sup>17</sup> *Rawle*, *Covenants for Title* (5th Ed.) § 250; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Hanrick v. Patrick*, 119 U. S. 156, 175; *Holbrook v. Debo*, 99 Ill. 372; *Stephenson v. Boody*, 139 Ind. 60.

<sup>18</sup> *Kimball v. Blaisdell*, 5 N. H. 533, 3 Gray's Cas. 761; *Gibbs v. Thayer*, 6 Cush. (Mass.) 30; *Coal Creek Min. & Mfg. Co. v. Ross*, 12 Lea (Tenn.) 1. But see *Bennett v. Davis*, 90 Me. 457.

<sup>19</sup> *Dickerson v. Colgrove*, 100 U. S. 578; *Keys v. Test*, 33 Ill. 316; *Blodgett v. McMurtry*, 34 Neb. 782; *Coogler v. Rogers*, 25 Fla. 853; *Mayer v. Ramsey*, 46 Tex. 371.

<sup>20</sup> *Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340; *Hatch v. Kimball*, 16 Me. 146; *Brown v. Union Depot St. Ry. & Transfer Co. of Stillwater*, 65 Minn. 508; *Guffey v. O'Reiley*, 88 Mo. 418, 57 Am. Rep. 424; *Thompson v. Sanborn*, 11 N. H. 201, 35 Am. Dec. 490; *Marines v. Goblet*, 31 S. C. 153, 17 Am. St. Rep. 22.



the land. Likewise, it has been decided that the true owner of land who stands by and sees another, under the belief that he has the unincumbered title to the land, make expenditures for improvements thereon, may be under such a duty to inform the person in possession of the true state of the title as to be thereafter estopped from asserting any rights in the land.<sup>21</sup> The mere failure to assert one's title, without any active misrepresentation in regard thereto, will not, however, have the effect of an estoppel, if the title appears of record, since one purchasing or improving the land is in such case charged with notice of the true state of the title.<sup>22</sup> An estoppel of this character, since it is based on a representation that one has not the title to land, and not that he has title, has of course no effect upon a title afterwards acquired by the person making the representation.<sup>23</sup>

This class of estoppel, though frequently spoken of as "equitable" estoppel, is ordinarily recognized and enforced in courts of law as well as in equity. But though the principles governing in this class of cases were not clearly recognized and formulated under that name until the nineteenth century,<sup>24</sup> before this there existed in equity a doctrine which was equivalent to the modern doctrine of estoppel by representation, to

<sup>21</sup> *Kirk v. Hamilton*, 102 U. S. 68; *Bryan v. Pinney* (Ariz.) 31 Pac. 548; *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17; *Thomas v. Pullis*, 56 Mo. 211; *Dellett v. Kemble*, 23 N. J. Eq. 58; *Redmond v. Excelsior Sav. Fund & Loan Ass'n*, 194 Pa. St. 643, 75 Am. St. Rep. 714.

<sup>22</sup> *Clark v. Parsons*, 69 N. H. 147, 76 Am. St. Rep. 157; *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 337; *Tongue's Lessee v. Nutwell*, 17 Md. 212, 79 Am. Dec. 649; *Mayo v. Cartwright*, 30 Ark. 407; *Campbell v. Jacobson*, 145 Ill. 389; *Staton v. Bryant*, 55 Miss. 261; *Knouff v. Thompson*, 16 Pa. St. 357; *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307.

<sup>23</sup> *Gluckauf v. Reed*, 22 Cal. 468; *Davidson v. Dwyer*, 62 Iowa, 332; *Donaldson v. Hibner*, 55 Mo. 492.

<sup>24</sup> *Pickard v. Sears*, 6 Adol. & E. 469 (A. D. 1837).

the effect that one who knowingly makes a false representation to one who acts on it is bound to make that representation good;<sup>25</sup> and a similar principle was also involved in the equitable rule that the fraudulent failure of one to make known his title to a person about to purchase the land from another would have the effect of changing the ordinary rule of priorities, and of postponing his claim to that of the purchaser.<sup>26</sup>

There has been very great difference of opinion as to whether the misrepresentation, whether by conduct or by express statement, must be fraudulent in order to give rise to an estoppel of this character. The decided weight of authority is to the effect that it need not be such;<sup>27</sup> but apart from the question of the existence of such a requirement in other cases, it is by some authorities asserted that, in order that one may, by reason of misrepresentations, be estopped to assert his title to land, he must have been guilty of fraud, since the application of the doctrine of estoppel by representation involves in effect a transfer of land, and that is, by the Statute of Frauds, required to be in writing.<sup>28</sup> Moreover, while, as a general rule, an estoppel by representation is as available at law as in equity, it is, by the decisions of some states, not available at law when the title to land is involved, on the ground that at law the Statute of Frauds must control, and that in equity only can the case be regarded as taken out of the statute by the fraud, actual or constructive, involved in the misrepresentation.<sup>29</sup> The view

<sup>25</sup> *Evans v. Bicknell*, 6 Ves. 174; *Bigelow, Estoppel*, 557.

<sup>26</sup> 2 *Pomeroy, Eq. Jur.* §§ 686, 731; *Ewart, Estoppel*, § 257.

<sup>27</sup> *Bigelow, Estoppel*, 629, note; *Ewart, Estoppel*, 83 et seq.; 2 *Pomeroy, Eq. Jur.* §§ 805, 806; 11 *Am. & Eng. Enc. Law* (2d Ed.) 431.

<sup>28</sup> *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Huyck v. Bailey*, 100 Mich. 223; *May v. Hanks*, 62 N. C. 310; 2 *Pomeroy, Eq. Jur.* § 807.

<sup>29</sup> *Doe d. McPherson v. Walters*, 16 Ala. 714; *Standifer v. Swann*,

is, however, taken in most jurisdictions,<sup>30</sup> that an estoppel may be asserted at law as well as in equity.

In equity the person in favor of whom the owner is estopped to claim the land is entitled to a conveyance of the land by the owner,—that is, the owner may be compelled to make good his representations;<sup>31</sup> this, as before stated, being a well-settled equitable doctrine before the legal development of the law of estoppel under that name.<sup>32</sup> In determining, therefore, the rights of the person to assert the estoppel as against persons other than the person who was originally guilty of the misrepresentation, the former should, it seems, be regarded as standing in the position of any other person having an equity to a conveyance. Consequently, the estoppel should be enforceable as against any subsequent owner of the land, as would any other equity, until the land passes to a *bona fide* purchaser for value.<sup>33</sup> This view has been sometimes applied,<sup>34</sup> though frequently the subject has been confused by undertaking to determine whether the subsequent owner of the land is a “privy” of a person originally estopped.

78 Ala. 88; *Hayes v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533; *Winslow v. Cooper*, 104 Ill. 235; *Suttle v. Richmond, F. & P. R. Co.*, 76 Va. 284.

<sup>30</sup> *Kirk v. Hamilton*, 102 U. S. 68; *Bigelow v. Foss*, 59 Me. 164; *Davis v. Davis*, 26 Cal. 23; *Shaw v. Beebe*, 35 Vt. 204; *Brown v. Bowen*, 30 N. Y. 519; *Beaupland v. McKeen*, 28 Pa. St. 124; *Levy v. Cox*, 22 Fla. 546; *Bigelow, Estoppel*, 715.

<sup>31</sup> *Citizens' Bank of Louisiana v. First Nat. Bank of New Orleans*, L. R. 6 H. L. 360; *Beatty v. Sweeney*, 26 Mich. 217; *Favill v. Roberts*, 50 N. Y. 222.

<sup>32</sup> Ante, note 25.

<sup>33</sup> See *Ewart, Estoppel*, 196, on which the view here presented is based.

<sup>34</sup> *Rutz v. Kehn*, 143 Ill. 558; *Southard v. Sutton*, 68 Me. 575; *Thistle v. Buford*, 50 Mo. 278; *Ions v. Harbison*, 112 Cal. 260; *Ramboz v. Stowell*, 103 Cal. 588; *Maxon v. Lane*, 124 Ind. 592; *Stinchfield v. Emerson*, 52 Me. 465, 83 Am. Dec. 524; *Hodges v. Eddy*, 41 Vt. 485, 98 Am. Dec. 612.

## CHAPTER XXVII.

### ESCHEAT AND FORFEITURE.

§ 458. Escheat.

459. Forfeiture.

Upon the death of the owner of land intestate, and without legal heirs, the land passes to the state by "escheat."

Land may be forfeited to the state in particular cases, as when an alien acquires land in violation of law, or, occasionally, when a corporation so does.

Land may be forfeited to an individual for breach of an express or implied condition subsequent.

§ 458. Escheat.

At common law, as before stated, an escheat of land occurred in favor of the feudal lord in case the tenure terminated by reason of the failure of inheritable blood, such failure arising from the corruption of the blood of the tenant by attainder of felony, as well as from the death of the tenant without any ascertainable heir.<sup>1</sup> In this country, in those states in which tenure is to be regarded as nonexistent,<sup>2</sup> the feudal conception of escheat cannot obtain, though even there the right of the state to land the owner of which dies intestate without heirs would no doubt be sustained as an attribute of sovereignty. Any question upon the subject, however, is avoided in most, if not in all, the states by statutory provisions that, upon the failure of other heirs, the

<sup>1</sup> 2 Bl. Comm. 244 et seq.; ante, § 10.

<sup>2</sup> Ante, § 14.

land shall pass to the state.<sup>3</sup> This right of the state to land in default of heirs is ordinarily spoken of as "escheat."

An "escheat" of this character may occur in states where aliens are forbidden to hold lands, as a result of the absence of all heirs other than aliens, and likewise owing to the inability of one, otherwise entitled to inherit, to trace his descent except through an alien.<sup>4</sup> But the term "escheat" is not, it seems, properly applicable to the forcible acquisition by the state of land which an alien has, in violation of law, undertaken to acquire by purchase, though the term is frequently so used, this being in the nature of the enforcement of a forfeiture by the state, rather than an escheat.<sup>5</sup>

#### § 459. Forfeiture—To state.

At common law, upon his attainder of high treason, one forfeited to the crown all his freehold estates, and, in case of petit treason and felony, his freehold estates for life, and his chattel interests absolutely.<sup>6</sup> In this country the effect of a conviction of crime is rarely to forfeit all the land of the wrongdoer, the statutes of most states providing explicitly that no conviction of crime shall work forfeiture of estate or corruption of blood, though in two or three there may, it seems, be a forfeiture of estate during the life of the offender.<sup>7</sup>

If an alien undertakes to acquire land in violation of the law of the particular state, he may, unless protected by the terms of a treaty with his government, be deprived of such land, and a forfeiture to the state be compelled.<sup>8</sup>

<sup>3</sup> 1 Stimson's Am. St. Law, §§ 400, 1151-1154, 3125.

<sup>4</sup> See post, § 505.

<sup>5</sup> See 2 Bl. Comm. 274, 293; 2 Kent's Comm. 61; *Read v. Read*, 5 Call (Va.) 207.

<sup>6</sup> 4 Bl. Comm. 381-385.

<sup>7</sup> 1 Stimson's Am. St. Law, §§ 143, 1162.

<sup>8</sup> Post, § 505.



During the American Revolution, many of the colonial governments confiscated the lands of persons supporting the royal cause,<sup>9</sup> and, during the Civil War, acts confiscating the property of persons aiding the Confederate cause were passed by congress, the confiscation, however, in the case of land, being limited to the term of the offender's natural life.<sup>10</sup> The confiscation of enemies' property is, at the present day, not generally approved by writers on international law, and is not practiced in wars of an international character.<sup>11</sup>

Occasionally the statute, in restricting the power of a corporation to acquire land, provides, expressly or impliedly, that land acquired by the corporation in violation of law shall be forfeited to the state.<sup>12</sup> In the absence of such a provision for forfeiture, though the state may annul the transfer or dissolve the corporation, it does not have any right to the land which the corporation thus wrongfully acquired.<sup>13</sup>

Land used for purposes which violate the internal revenue laws in certain ways become subject to forfeiture, by express provision of statute, to the United States government.<sup>14</sup>

At common law, the proceeding on the part of the state to enforce a forfeiture as well as an escheat was by "office found" or "inquest of office," this being a proceeding, by the aid of a jury, which was made use of in any cases in

<sup>9</sup> Sabine, *Loyalists of American Revolution*, 75 et seq.

<sup>10</sup> *Jenkins v. Collard*, 145 U. S. 546.

<sup>11</sup> Taylor, *International Law*, § 540; Lawrence's *Wheaton, Internat. Law*, 596 et seq.

<sup>12</sup> See *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Com. v. New York, L. E. & W. R. Co.*, 132 Pa. St. 591, 139 Pa. St. 457.

<sup>13</sup> *National Bank of Commerce v. Licking Valley Land & Mining Co.*, 15 Ky. Law Rep. 211, 22 S. W. 881; *Com. v. New York, L. E. & W. R. Co.*, 132 Pa. St. 591, 139 Pa. St. 457; *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621; *Fayette Land Co. v. Railroad Co.*, 93 Va. 274.

<sup>14</sup> Rev. St. U. S. § 3400.

which the crown asserted a claim to lands or goods.<sup>15</sup> There is, in some states, a statutory proceeding for the enforcement of such rights, but an inquest of office as at common law, or, it seems, an action of ejectment, would be sufficient to try the rights of the state to the land in any such case.

—— **To individual.**

A tenant of a particular estate usually holds it subject to certain implied conditions. At common law, a life tenant held the land subject to an implied condition that he should not make a feoffment thereof in fee simple, since this divested the whole fee-simple title, and by so doing he forfeited his estate. This ground of forfeiture is now obsolete, since a modern conveyance passes only such interest as the grantor has.<sup>16</sup> A life tenant may, however, at the present day, forfeit his interest by the commission of acts of waste, the statute frequently containing a provision to this effect.<sup>17</sup> A tenant under a lease may also forfeit his tenancy by his disclaimer of his landlord's title, and, in some states, by the use of the premises for an illegal purpose.<sup>18</sup> A forfeiture of an estate for breach of a condition is enforced by the grantor of the estate or his successor in interest by means of a re-entry or an action of ejectment.<sup>19</sup>

The question of the forfeiture of an estate in land for breach of an express condition subsequent has been before considered.<sup>20</sup>

<sup>15</sup> 3 Bl. Comm. 358.

<sup>16</sup> Ante, § 32.

<sup>17</sup> 1 Stimson's Am. St. Law, § 1332.

<sup>18</sup> Ante, § 52.

<sup>19</sup> Ante, § 74.

<sup>20</sup> Ante, §§ 74-77.

## CHAPTER XXVIII.

### TRANSFER UNDER JUDICIAL PROCESS OR DECREE.

- § 460. Sales and transfers under execution.
- 461. Sales in equity at the instance of creditors.
- 462. Sales of decedents' lands.
- 463. Sales of lands of infants and insane persons.
- 464. Sales and transfers for purpose of partition.
- 465. Equitable decrees transferring title.
- 466. Adjudications of bankruptcy.

An estate in land may in some cases be transferred by an officer acting under process from a court, or by a judicial decree confirmatory of a transfer made by an officer of the court, and occasionally by a decree alone. Such transfers occur in the case of (1) sales of estates in land under execution at the instance of creditors; (2) sales by order of a court of equity at the instance of creditors; (3) sales of lands of decedents, usually for the payment of debts and legacies; (4) sales of lands of infants and insane persons; (5) sales and transfers for purpose of partition; (6) equitable decrees, under state statutes, transferring title; (7) adjudications of bankruptcy, by which title passes to the bankrupt's trustee.

#### § 460. Sales and transfers under execution.

The land of a debtor was first made subject to the claims of creditors by an early statute,<sup>1</sup> which provided that one who had recovered a judgment might elect to have the sheriff deliver to him the chattels of the debtor and one-half his land, the writ under which this was done being termed a "*writ of elegit*," because it recited that the creditor had elected (*elegit*) to pursue that remedy. Formerly the creditor had merely the right to retain the land taken under this writ

<sup>1</sup> 13 Edw. I. c. 18 (St. Westminster II.).

until the rents and profits sufficed to pay the judgment, he being known as a tenant by *elegit*; but now, by statute in England, the creditor may not only take all the debtor's land under the writ, but he may obtain an order for the sale of the land, the proceeds being distributed among all the creditors.<sup>2</sup>

The writ of *elegit* has been made use of in but few states, and is at the present day, it seems, obsolete in every state but Delaware.<sup>3</sup> In most of the states the same method is authorized for the realization of debts from the land of the judgment debtor as from his chattels,—that is, a seizure and sale by the sheriff, and application of the proceeds to the payment of the judgment. In the New England states, however, the satisfaction of a judgment out of the debtor's land is usually obtained, not by a sale of the land, but by a delivery of the land, or a part thereof, at a value fixed by appraisers, to the judgment creditor, this being known as a levy “by extent,” and the land being said to be “extended.” The statutory provisions as to the method of making the extent are full and precise, and they must be strictly followed. A certain period, usually six months or a year, is allowed to the debtor in which he may pay the judgment and recover the extended lands, but, if this is not done, the creditor acquires the whole estate and interest of the debtor absolutely.<sup>4</sup> The satisfaction of a pecuniary judgment, whether by a sale under the writ or an extent, is known as an “execution” of the judgment.

As a general rule, all legal interests in land other than tenancies at will, bare legal titles, liens, and, in most states,

<sup>2</sup> Williams, Real Prop. (18th Ed.) 250.

<sup>3</sup> 3 Freeman, Executions (3d Ed.) § 370.

<sup>4</sup> 3 Freeman, Executions, § 372 et seq.; 2 Dembitz, Land Titles, § 173.

it would seem, contingent future interests, may be sold under a writ of execution.<sup>5</sup> At common law there was no method by which the equitable interests could be reached by execution, but, by the Statute of Frauds,<sup>6</sup> it was enacted that the execution might be levied on lands of which any other person or persons were seised or possessed of in trust for the execution debtor. This provision has been adopted or re-enacted in a number of the states, but it has usually been construed as applicable only in cases in which a *cestui que trust* has, under an express declaration of trust, the exclusive enjoyment of a beneficial interest, the legal title to which is in another, and neither it nor its American counterparts have had the effect of making all equitable interests subject to execution. In some states, however, more liberal statutes have been adopted, subjecting equitable interests generally to execution, while in others the common-law rule which prevailed previous to the Statute of Frauds still controls.<sup>7</sup> Equitable interests which cannot be sold under execution may usually be reached by a proceeding in equity, known as a "creditors' bill."<sup>8</sup>

A sale by a sheriff under a writ of execution is by force of a statutory power,<sup>9</sup> and is effective, if legally made, and followed by a conveyance to the purchaser, to divest the title of the judgment debtor, and to vest it in the vendee. In order that the sale may have this effect, it must be made under a judgment rendered by a court having jurisdiction of the subject-matter and the parties.<sup>10</sup> If the judgment is

<sup>5</sup> 2 Freeman, Executions, § 172.

<sup>6</sup> 29 Car. II. c. 3, § 10.

<sup>7</sup> 2 Freeman, Executions, §§ 187-189; 11 Am. & Eng. Enc. Law (2d Ed.) 632.

<sup>8</sup> 2 Freeman, Executions, § 424 et seq.; 5 Enc. Pl. & Pr. 393. See post, § 461.

<sup>9</sup> See ante, § 274.

<sup>10</sup> Freeman, Executions, §§ 19, 20; Kleber, Void Judicial Sales, §§ 262-267, 294.



valid, an innocent purchaser at the sale is not usually affected by irregularities in the proceedings leading up to the sale, though, if the judgment creditor is the purchaser, the rule is different, and he is regarded as chargeable with notice of any irregularities.<sup>11</sup>

The statutes of a number of states give the judgment debtor a certain period after the execution sale within which he may redeem therefrom. In the absence of statute, there is no right of redemption.<sup>12</sup>

The sheriff is required, by the statutes of most, if not all, the states, to make a conveyance of the land to the purchaser at the sale, and this is usually regarded as necessary to vest the legal title in the purchaser. This conveyance should recite the recovery of the judgment, the issue of the writ, and the sale thereunder, but any requirements in this regard are regarded as directory merely. The conveyance must usually be executed like other conveyances, and an acknowledgment is, in most states, though not in all, necessary only for the purpose of record. If the conveyance is invalid, the purchaser is ordinarily entitled to have a valid one executed in its place.<sup>13</sup>

In the case of a sale under execution, the sale is made by the sheriff as a ministerial officer, acting under the writ, and the court has no control over his actions, and, except in a few states, no confirmation of the sale by the court is necessary in order to validate the sale. An execution sale is accordingly to be distinguished from the sales hereafter referred to in this chapter, which are made in conformity with the order of a court, and must be confirmed by it, and which are accordingly regarded as the act of the court, though a commissioner or other officer is necessarily employed by the

<sup>11</sup> 3 Freeman, Executions, § 339 et seq.

<sup>12</sup> 3 Freeman, Executions, § 314.

<sup>13</sup> 3 Freeman, Executions, § 324 et seq.

court as an instrument in making the sale. An execution sale is accordingly not, properly speaking, a judicial sale.<sup>14</sup>

§ 461. Sales in equity at the instance of creditors.

The various liens to which land may be subject in behalf of a person other than the owner are enumerated in another part of this work.<sup>15</sup> These liens are almost invariably enforced by a sale of the land under the decree of a court of equity for the purpose of paying the amount of the lien from the proceeds. Likewise, equity may decree a sale in a creditors' suit brought to obtain a discovery of assets, or to reach property which is not subject to execution because of its equitable character, or because transferred by a conveyance fraudulent as to creditors.<sup>16</sup>

§ 462. Sales of decedents' lands.

At common law, an unsecured debt could not be enforced, as against the real property of the debtor after the latter's decease, unless it was due on a contract under seal, which expressly bound the debtor's heirs, and then it could be enforced against the heir to the extent of any land in fee simple descended to him.<sup>17</sup> Under this condition of the law there was no remedy available to even the specialty creditor in case the decedent had devised the land, or the heir had aliened it, and, accordingly, it was provided by statute<sup>18</sup> that a devisee should be liable to the same extent as the heir, and that no alienation by either the heir or the devisee should affect his liability for the debt. These statutes imposed on the heir and devisee a personal liability for the land to the extent

<sup>14</sup> Kleber, *Void Judicial Sales*, §§ 15-20.

<sup>15</sup> *Post*, Part VI.

<sup>16</sup> 3 Pomeroy, *Eq. Jur.* §§ 1413-1415. See note 8, *ante*.

<sup>17</sup> 2 *Bl. Comm.* 244; *Williams, Real Prop.* (18th Ed.) 262.

<sup>18</sup> 3 *Wm. & M. c.* 14 (A. D. 1691); 6 & 7 *Wm. III. c.* 14 (A. D. 1695); 1 *Wm. IV. c.* 47 (A. D. 1830).

of the value of land descended or devised to him, and this was restricted to debts under seal. Later it was provided<sup>19</sup> that all interests in land should be assets for the payment of debts, whether by simple contract or under seal, and that the heir or devisee might be sued in equity accordingly by any creditor of the deceased. In this country there is probably in every state a statute making the realty of a decedent liable for his debts as against his heirs and devisees.<sup>20</sup>

Under the English statute making the lands of a decedent liable in equity for his debts, the proceeding to subject the land was by a "creditors' bill" in equity, and this mode of proceeding for the purpose is recognized in a number of the states.<sup>21</sup> In most of the states, however, the probate court has full jurisdiction to order the sale of land for the payment of debts, and likewise, frequently, for other purposes, such as the payment of legacies, or in order to make distribution, and the statutes usually provide that such sales shall be ordered on the application of the executor or administrator.<sup>22</sup> The length of time after the decedent's death within which a sale of lands for this purpose can be applied for by the personal representatives or the creditors of deceased is in some states fixed by statute.<sup>23</sup> In the absence of statute, it is said that the application must be made within a reasonable time,<sup>24</sup> and some courts have adopted the statutory period in which an action to recover lands is barred, holding that an

<sup>19</sup> 3 & 4 Wm. IV. c. 104 (A. D. 1833).

<sup>20</sup> 2 Dembitz, Land Titles, § 150; 2 Woerner, Administration, §§ 463, 490; 11 Am. & Eng. Enc. Law (2d Ed.) 838.

<sup>21</sup> 3 Pomeroy, Eq. Jur. §§ 1152-1154; 2 Woerner, Administration, § 463; 11 Am. & Eng. Enc. Law, 1072.

<sup>22</sup> 2 Woerner, Administration, §§ 463, 464.

<sup>23</sup> 2 Woerner, Administration, § 465.

<sup>24</sup> Liddel v. McVickar, 11 N. J. Law, 44; Rosenthal v. Renick, 44 Ill. 202; Killough v. Hinton, 54 Ark. 65; State v. Probate Court of Ramsey County, 40 Minn. 296; Ferguson v. Scott, 49 Miss. 500. See Bindley's Appeal, 69 Pa. St. 295.

application thereafter is, in the absence of special circumstances, too late.<sup>25</sup>

A sale of real estate to pay debts is ordinarily authorized only when the personal estate is insufficient for the purpose, and that such is the case must appear from the bill or petition for sale in order to give the court jurisdiction. In some states proceedings for sale by an executor or administrator are regarded as adversary to the heirs or devisees, so that a failure to give the notice to the latter as required by statute renders the sale void. In other states they are regarded as proceedings *in rem*, and so valid, though no notice is given.<sup>26</sup> In a number of states the failure of the executor or administrator to give bond before making sale as required by the statute is regarded as absolutely invalidating the sale, and sometimes such effect is given to a failure to make the proper oath.<sup>27</sup>

The sale must comply not only with the requirements of the statute, but also with the terms of the order for sale. The sale, when made by the executor or administrator, must, in most states, be confirmed by the court in order to have any effect whatever in passing title, since the personal representative, not expressly empowered to sell by the terms of the will, is regarded as the instrument of the court, and the sale, to be valid, must be adopted by the court as its own act.<sup>28</sup> After the sale is confirmed, the executor or administrator, still acting as the instrument of the court, is required to make a conveyance of the land to the purchaser,

<sup>25</sup> Ricard v. Williams, 7 Wheat. (U. S.) 59; Wingerter v. Wingerter, 71 Cal. 105; Rosenthal v. Renick, 44 Ill. 202; Bozeman v. Bozeman, 82 Ala. 389; Sumner v. Child, 2 Conn. 607.

<sup>26</sup> 2 Woerner, Administration, § 466; Kleber, Void Judicial Sales, §§ 72, 156.

<sup>27</sup> 2 Woerner, Administration, § 472; Kleber, Void Judicial Sales, §§ 253, 254, 316, 317.

<sup>28</sup> Kleber, Void Judicial Sales, §§ 1-4, 381.

and, until such conveyance is executed, the purchaser has an equitable title merely.<sup>29</sup>

**§ 463. Sales of lands of infants and insane persons.**

The extent to which a court of equity has inherent power to sell the land of an infant for his benefit seems to be involved in considerable doubt; but the question has lost its importance, owing to the passage of acts, in most, if not all, of the states, authorizing such sales either by courts either of equity or probate jurisdiction. These sales are usually conducted by the guardian of the infant, under the direction of the court, the proceedings being generally similar to those in the case of sales of decedents' lands. The application for the sale is usually required to be made by the guardian, but in some states the statute authorizes it to be made by parents or other persons interested in the infant's welfare.<sup>30</sup>

The lands of persons *non compos mentis* may likewise be sold under the direction of a court by force of statutes to that effect in all or in most of the states, and occasionally such power has been asserted by courts of equity apart from statute. The sale is usually made by the committee or guardian of the lunatic acting as an instrument of the court.<sup>31</sup>

**§ 464. Sales and transfers for purpose of partition.**

Proceedings by one concurrently interested in land with others, to obtain a partition or sale of the land, have previously been discussed.<sup>32</sup> In this country the jurisdiction of proceedings for partition is usually determined by the statute, and there are in many states special provisions for

<sup>29</sup> 2 Woerner, Administration, § 480.

<sup>30</sup> Woerner, Guardianship, §§ 68-78; 2 Dembitz, Land Titles, § 151; 3 Pomeroy, Eq. Jur. § 1309; Kleber, Void Judicial Sales, §§ 93, 157, 234-236.

<sup>31</sup> Woerner, Guardianship, § 148; 2 Dembitz, Land Titles, § 152.

<sup>32</sup> Ante, § 175.



the partition of land belonging to a decedent in the probate court, or for a sale for the purpose of partition.<sup>33</sup>

As before stated, a partition proceeding is available only in the case of concurrent interests in land,<sup>34</sup> and consequently cannot be employed in order to apportion the land, or to procure a sale, when the persons interested in the land own, not concurrent, but successive, interests, as when they are tenants for life and in remainder, or one is tenant in fee simple, subject to an executory limitation in favor of the other. In a few states there is a provision for a sale in such case under the direction of a court of equity.<sup>35</sup>

#### § 465. Equitable decrees transferring title.

The court of chancery in England always acted *in personam*, and not *in rem*, and consequently, in adjudicating rights of the different parties to a proceeding concerning land, it did not, by its decree, undertake to transfer the title from one to the other of such parties, but gave relief by ordering one party to make a conveyance, cancel an instrument, or do other acts so as to establish and perfect the rights of the respective parties as adjudicated. This principle of action on the part of courts of equity has, however, been changed by statute in many states of the country, so that, instead of requiring the parties to carry out the decree, the court itself does so, acting through a commissioner or other officer, and, under some statutes, the decree alone, without any further action, is sufficient to transfer the title. As regards land outside the jurisdiction, however, the court must still act *in personam*.<sup>36</sup>

While a judgment in an action concerning land of a strict-

<sup>33</sup> Freeman, Cotenancy, §§ 550-564.

<sup>34</sup> Ante, § 175.

<sup>35</sup> 2 Dembitz, Land Titles, § 156.

<sup>36</sup> Pomeroy, Eq. Jur. §§ 134, 135, 170, 1317.

ly legal character, such as ejectment, or the old real actions, or the statutory "trespass to try title," is usually decisive of the rights of the parties thereto in regard to the ownership of the land, as between themselves, it cannot be regarded as transferring the title in any sense, but merely decides what effect is to be given to previous transfers.

**§ 466. Adjudications of bankruptcy.**

The present bankrupt act<sup>37</sup> provides that the trustee of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. The title to the bankrupt's land, therefore, as well as other property, passes, as it were, by force of the adjudication of bankruptcy, to the trustee subsequently appointed. Previous bankrupt acts, as well as the insolvency statutes of the various states, have contained similar provisions transferring the property of the bankrupt or insolvent to the trustee, for the purpose of distribution among creditors.<sup>38</sup>

<sup>37</sup> Act July 1, 1898 (30 Stat. 565, § 70a).

<sup>38</sup> 16 Am. & Eng. Enc. Law, 721.

## CHAPTER XXIX.

### TRANSFER FOR NONPAYMENT OF TAXES.

§ 467. Character of title acquired.

468. Judgment for taxes.

469. Forfeiture to state.

470. Remedial legislation.

By statutory provision, land is usually liable to be sold in case of nonpayment of taxes thereon. The sale is, under some statutes, of the land without reference to the particular estates or interests therein, and, under others, of the estate or interest only of the person against whom the tax is assessed.

The proceedings leading up to the sale, including the levy and assessment of the taxes, must, for the most part, be strictly followed. The title does not pass till a deed is made to the purchaser by the officer making the sale, and such deed is not made until a certain period, named in the statute, has elapsed, during which any person interested in the land may redeem from the sale. In some states the tax sale is required to be preceded by a judgment determining the amount of taxes due.

In some states, land may be forfeited directly to the state for nonpayment of taxes.

In many states the statutes undertake to render a sale for taxes valid in spite of irregularities in the proceedings. Such statutes are usually valid only as applied to such parts of the proceeding as could have been previously dispensed with by statute.

§ 467. Character of title acquired.

The payment of taxes on land is in this country usually enforced by a summary sale of the land, conducted by the tax collector or some other ministerial officer.

The power to sell lands for nonpayment of taxes is a purely statutory power, and it has always been held that the statutory requirements as to the mode of making sale must be strictly complied with, and that, moreover, since the power to sell exists only in case there are valid taxes, which are unpaid, no title will pass unless the tax was levied and assessed in accordance with law. Tax sales have accordingly been held to be invalid in particular cases for want of a valid assessment or valuation of the property, duly verified by the proper officers, and approved by the legal reviewing authority or "board of equalization," defects in the levy of the tax, defects in the warrant issued to the collector for the collection of the tax, failure to return the list of delinquent taxes, noncompliance with the various requirements as to the mode of advertising the sale, failure to comply with the statute, and also with the advertisement, as to the conduct of the sale, failure to sell all the land, though a part brings enough to pay the taxes. Furthermore, the statutory requirements as to the return of the sale by the officer must be complied with, and he must make a conveyance to the purchaser in strict conformity to the statute. The sale is also invalid if the tax was unconstitutional, or not properly levied by the legislature or the municipal authorities, or if the land was exempt, or the taxes had been paid before the sale. In view of these many possible defects in the proceedings, as well as others which might be mentioned, it is not strange that titles based on tax sales are generally regarded as of most questionable soundness, and, though this condition of things has been to some extent removed by legislation, hereafter referred to, the possibilities of failure of title through defects in the proceedings are still such that land, when sold for taxes, rarely, if ever, brings its actual value, and its (1064)

purchase is ordinarily for purposes of speculation, rather than for actual occupation.<sup>1</sup>

By the statutes of many states, the sale is of an estate in fee simple in the land, free from any incumbrances, and without reference to the estate or interest belonging to the particular person against whom the tax was assessed,—that is, the proceeding for sale is in effect against the land, and not against any particular owner thereof; and if one interested in the land, though not bound to pay the taxes as against the person in possession, desires to protect his interest, he must pay the taxes, or redeem from the tax sale. So, a remainderman or lienor may, by the failure of the owner in possession to pay the taxes, be divested of all interest in the land. In some states, however, or under particular acts, the taxes are not enforceable against the entire interest in the land, but against the interest only of the person against whom the taxes are assessed, in which case the interests of other owners or of lienors are not divested by the sale.

The statute usually, if not always, names a certain period, varying from six months to three years, within which the owner of the land may redeem from the sale by the payment to the purchaser of the purchase money, interest, and costs, in addition to which he is ordinarily required to pay a penalty, calculated in interest at a high rate.

The purchaser has, until the execution of a conveyance or “deed” by the officer making the sale, neither a legal nor equitable title to the land, but rather a lien thereon for the amount of the purchase money, interest, costs, and penalty. He is usually entitled to the deed upon the expiration of the

<sup>1</sup> An admirable sketch of the uncertainties involved in a tax title is contained in 2 Dembitz, Land Titles, p. 1323 et seq. The standard works upon the very extensive subject of tax sales are those by Robert S. Blackwell, the fifth edition of which is well edited by Frank Parsons, Esq., and by Henry C. Black, Esq.



time for redemption, and not before, and the statutes frequently impose certain formalities as conditions precedent to his obtaining the deed. The requirements of the statute as to the form of the deed, which are frequently most detailed and precise in character, and often include full recitals of the antecedent proceedings, must be strictly followed, and the deed must be executed in strict compliance with the statute in order to vest the title in the purchaser.

**§ 468. Judgment for taxes.**

In some states the legislature has provided that the sale of land for taxes shall be preceded by the rendition of a judgment determining the amount of the taxes due. The proceeding to obtain such a judgment is in the nature of a proceeding *in rem* against the land, rather than *in personam* against the owner of the land, and, consequently, personal service of notice of the proceeding is not regarded as a prerequisite to the judgment, constructive service by publication being authorized. Any objections to the validity of the tax or to the assessment must be made by way of defense to the application for judgment, and the judgment is, until reversed, regarded as conclusive of the right to make the sale, according to numerous decisions, even though the taxes were actually paid.

**§ 469. Forfeiture to state.**

The statute occasionally provides that, upon nonpayment of taxes due the state, the land, instead of being sold, shall be forfeited to the state. Whether such a forfeiture is valid if not preceded by a judicial finding that a default in the payment of taxes exists is a question open to very considerable doubt.<sup>2</sup>

<sup>2</sup> Cooley, *Taxation*, 461 et seq.

**§ 470. Remedial legislation.**

The legislatures of the various states have, particularly in more recent years, frequently passed curative statutes for the purpose of validating tax sales previously made, as well as those thereafter to be made. These acts are regarded as valid in so far as they undertake to validate the proceedings in respect to a particular step therein with which the legislature could have dispensed in the first place, but no further. The same end of curing defective proceedings has frequently been attained by the passage of acts providing that the deed to the purchaser shall be *prima facie* evidence of the regularity of the proceedings, and it has sometimes been made even conclusive evidence in this respect, this latter legislation being valid, however, as are other curative acts, in regard only to matters which could have been previously dispensed with.

Another mode in which the legislatures have undertaken to add to the security of the purchaser at a tax sale is by "short" statutes of limitation in connection with tax titles, requiring the original owner to proceed to recover the land from the purchaser within a certain number of years, less than that within which actions for land must ordinarily be brought. These statutes have usually, like the other statutes having the same purpose in view, been regarded as applicable only when the jurisdictional requirements of a valid sale were present, and as insufficient to validate a sale which is void for want of jurisdiction on the part of the officials to make the sale.

## CHAPTER XXX.

### APPROPRIATION UNDER EMINENT DOMAIN.

- § 471. The power to appropriate.
- 472. Rights subject to appropriation.
- 473. Mode of appropriation.
- 474. Time of passing of title.

Under its power of eminent domain the state may appropriate private property, including land, or particular interests therein, for public use, upon payment of just compensation. The power may be exercised by the state or any corporation or person to whom it delegates the power.

The title to the land appropriated does not usually pass till payment of the compensation therefor, but the statute may provide that it shall do so, in the absence of any explicit constitutional prohibition.

#### § 471. The power to appropriate.

The power of the state to appropriate property for public use, upon payment of just compensation, may be exercised directly by the state itself, or the state may, in the exercise of the power, select particular agencies, either natural persons or corporations, on whom it confers the right to take private property for public use. Thus, the legislature may, and ordinarily does, authorize municipal corporations to appropriate or "condemn" land for street and other municipal purposes, and so it may authorize a railroad or irrigation company, or other private corporation, to appropriate property for its use, upon payment of just compensation, provided only the use for which it is appropriated is of a public character. This grant by the legislature of the right to ex-

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ercise the power is frequently by means of a general statute operating in favor of the corporations of a particular class which may desire to exercise the right.<sup>1</sup>

The result of the exercise of the power in connection with land is to transfer to the state, or to the corporate body to which the power is delegated by the state, all or some of the rights in particular land previously vested in a particular individual, or in a number of individuals.

### § 472. Rights subject to appropriation.

There may be an appropriation of the rights of ownership in a particular piece of land, the entire interest of the former owner thus passing to the appropriator, or a right merely to use the land for the particular public purpose may be acquired. Whether there is an appropriation of the ownership of the land is usually a question of the construction of the statute under which the land is condemned, in connection with any constitutional restrictions upon the power. In the case of a taking by a private corporation there is usually a presumption that the ownership, or, as it is ordinarily expressed, the "fee," does not pass, and, unless the statute explicitly authorizes the taking of a fee, or this is necessary for the particular use, it is usually considered that a right of user only is taken by even a public corporation.<sup>2</sup> Accordingly a railroad company ordinarily acquires by condemnation merely an easement in the land, and, in the case of land taken for highway purposes, the public frequently acquires merely the right to use the land for such purposes.

The rights of the owner of land may be infringed, not by the actual taking of the land for a particular public purpose, but by the fact that the utilization of neighboring land

<sup>1</sup> Randolph, *Eminent Domain*, §§ 102-106; 1 Lewis, *Eminent Domain*, § 243.

<sup>2</sup> Randolph, *Eminent Domain*, § 205; 1 Lewis, *Eminent Domain*, § 278.

for such a purpose results in the forcing of water upon the former land, or the casting thereon of stone, earth, or sewerage, thus interfering with the owner's rights of user in the land, and to that extent appropriating his rights in the land.<sup>3</sup> The taking for public use may also involve, not a physical invasion of the land itself, but merely the divesting of some of the natural rights incident to the ownership of land. So, one may be divested of rights as to the flow of a natural watercourse, of access to water, or of rights with respect to percolating and surface water. Likewise, one may be deprived of his natural right to freedom from dust, smoke, noise, and the like. The cases are in very considerable conflict as to the right to compensation for consequential injuries to land, arising from the invasion of the natural rights of freedom from dust, noise, or noxious odors.<sup>4</sup>

One may, moreover, be deprived, by the physical appropriation of another person's land, of an easement which he enjoys in such land.<sup>5</sup>

The fact that one's land abuts on a highway or street is quite generally considered to give him certain rights of light, air, and access, interference with which entitles him to compensation as for the taking of property. Rights of this character, as the subject of compensation, have been before considered, as has the question of the extent to which the previous appropriation or dedication of land for a highway authorizes its use, without further compensation, for particular purposes, on the ground that such purposes are of a "highway" character.<sup>6</sup>

<sup>3</sup> *Pumpelly v. Green Bay & Mississippi Canal Co.*, 13 Wall. (U. S.) 166; *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504, *Finch's Cas.* 1.

<sup>4</sup> *Randolph, Eminent Domain*, § 152; 1 *Lewis, Eminent Domain*, § 151a.

<sup>5</sup> *Arnold v. Hudson River R. Co.*, 55 N. Y. 661; *Ladd v. City of Boston*, 151 Mass. 585; 1 *Lewis, Eminent Domain*, § 144.

<sup>6</sup> *Ante*, § 365.



**§ 473. Mode of appropriation.**

The statutes usually contain explicit provisions as to the constitution of the tribunals which are to decide the amount of compensation to be paid for the property taken. Such a tribunal may, in the absence of any statutory requirement to the contrary, be composed of a jury of less than twelve men, or of a board of commissioners.

The petition for the condemnation should show the public character of the use, and the necessity of taking the particular land, and this latter must be accurately described. Notice to the owner is necessary before the compensation is assessed, but constructive notice by publication is usually regarded as sufficient. The action of the tribunal in fixing the amount of the compensation is frequently subject to review by appeal or *certiorari*, but is not so in the absence of a statutory provision. In the case of an attempted taking of private property under color of the right of eminent domain, which is, however, unauthorized, on account of the private nature of the use, the lack of necessity for the appropriation, or lack of legislative authority, the owner may usually obtain an injunction against the wrongful entry on the land, or may sue in ejectment or trespass, and sometimes other remedies are available.

The constitutions of some states provide that compensation shall be made before the land is taken, but in others, where there is no such provision, the legislature sometimes authorizes a taking of property, and leaves the onus upon the landowner of instituting proceedings to ascertain the compensation to be paid, and to enforce its payment. Such legislation has usually been supported in the case of a taking by the state or a municipal corporation, but in a number of states it has been held that, in the case of the actual occupation of land by a private corporation, the payment of the compensation must be in some way secured to the owner of

the land before he can thus be deprived of his property. When the taking of property does not involve the direct occupation of the land of the person claiming compensation, but merely consequential injuries thereto, the recovery of compensation is naturally subsequent to the acts which constitute the taking, since they were not previously ascertainable.<sup>7</sup>

**§ 474. Time of passing of title.**

The statute is usually construed as divesting the title of the owner of the land only upon payment of the compensation awarded,<sup>8</sup> and this is necessarily the case when the constitution provides that the compensation shall be paid previous to the taking. In the absence of such a constitutional provision, the statute may authorize the taking of the land before payment. Such a statutory provision is sometimes construed as not transferring the title before payment of the award, but as merely giving a right of entry and occupation of the land as a preliminary to acquiring title by condemnation.<sup>9</sup> But, in the absence of such a constitutional provision as that referred to, the fact that the constitution requires a just or reasonable compensation to be paid does not prohibit a statute authorizing the passing of the title before payment of the compensation, provided there is adequate

<sup>7</sup> Randolph, *Eminent Domain*, §§ 231, 291, 362; 1 Lewis, *Eminent Domain*, §§ 456-459, 607.

<sup>8</sup> *New Orleans & S. R. Co. v. Jones*, 68 Ala. 48; *City of Chicago v. Barbican*, 80 Ill. 482; *Stacey v. Vermont Cent. R. Co.*, 27 Vt. 39; *Manchester & K. R. Co. v. Keene*, 62 N. H. 81; *Fox v. Western Pac. R. Co.*, 31 Cal. 538; *Perkins v. Maine Cent. R. Co.*, 72 Me. 95; *Williams v. New Orleans, M. & T. R. Co.*, 60 Miss. 689; *Provolt v. Chicago, R. I. & P. R. Co.*, 57 Mo. 256; *Jones v. Miller (Va.)* 23 S. E. 35; *Levering v. Philadelphia, G. & N. R. Co.*, 8 Watts & S. (Pa.) 459.

<sup>9</sup> *Fox v. Western Pac. R. Co.*, 31 Cal. 538; *Cushman v. Smith*, 34 Me. 247; *Kennedy v. Indianapolis*, 103 U. S. 599.

provision for the ascertainment and collection of the compensation.<sup>10</sup>

By a number of decisions it is held that the owner of the land has a lien for the amount of the compensation, either by force of the specific statutory provisions, or by analogy to a vendor's lien for the purchase price.<sup>11</sup> Such decisions seem necessarily to imply that the ownership of the land has passed by the condemnation proceeding, since one cannot usually have a lien on his own land.

<sup>10</sup> *Sweet v. Rechel*, 159 U. S. 380; *Ballou v. Ballou*, 78 N. Y. 325; *City of Pittsburgh v. Scott*, 1 Pa. St. 309.

<sup>11</sup> *Organ v. Memphis & Little Rock R. Co.*, 51 Ark. 235; *Kittell v. Missisquoi R. Co.*, 56 Vt. 96; *Bridgman v. St. Johnsbury & L. C. R. Co.*, 58 Vt. 198; *Drury v. Midland R. Co.*, 127 Mass. 571; *Lycoming Gas & Water Co. v. Moyer*, 99 Pa. St. 615; *In re New York, W. S. & B. Ry. Co.*, 94 N. Y. 287; *Frelinghuysen v. Central R. Co. of New Jersey*, 28 N. J. Eq. 388; *Gillison v. Savannah & C. R. Co.*, 7 Rich. (S. C.) 173; *Provolt v. Chicago, R. I. & P. R. Co.*, 69 Mo. 633; *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397; 2 Lewis, *Eminent Domain*, § 620.

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## CHAPTER XXXI.

### NOTICE, PRIORITY, AND RECORDING.

- § 475. The equitable doctrines.
- 476. The recording acts.
- 477. Sufficiency of record.
- 478. Persons affected with notice by record.
- 479. Notice as substitute for recording.
- 480. Notice from possession.
- 481. Notice from statements in instruments of title.
- 482. Purchasers under particular classes of conveyances.
- 483. Purchasers for value.
- 484. Purchasers with notice from purchasers without notice.
- 485. Purchasers without notice from purchasers with notice.
- 486. Purchasers at execution sales.
- 487. *Lis pendens*.

Any conflict arising in connection with particular land, as between persons claiming under different conveyances by the same person, is ordinarily determined by the doctrine of notice, one acquiring title for value being entitled to assert his claim as against a claim which had previously accrued in favor of another, provided he did not have notice of such prior claim, and not otherwise.

A subsequent purchaser may have actual notice of a prior instrument vesting rights in another, or he may have constructive notice thereof, by reason of the record of such instrument under the recording acts, from the possession of the land by one claiming under such instrument, or from any other facts reasonably calculated to put him on inquiry as to such adverse claim.

That the record of an instrument may affect a subsequent purchaser with notice, the record must be in conformity to law, and the instrument must usually have been acknowledged.

Notice to a subsequent purchaser sufficient to postpone his  
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claim to one under a prior instrument may arise from the fact that his agent has notice of such instrument.

One having constructive notice of an instrument by reason of its record is charged with notice of whatever is contained in such instrument, or is referred to therein.

In some states, but not in all, a subsequent purchaser cannot claim as against a prior instrument, although this be unrecorded, unless his own conveyance be recorded.

A purchaser under a quitclaim deed cannot, in some states, claim priority as against a prior conveyance, although the latter be unrecorded, and he has no notice thereof.

One who acquires rights in land otherwise than for a valuable consideration takes subject to all prior instruments affecting the land.

If one acquires land free from an adverse claim because without notice thereof, one to whom he sells the land takes it in the same condition, unless his vendor originally acquired the land from him.

By the doctrine of "*lis pendens*," one acquiring land, pending litigation in regard thereto, from one of the parties to the litigation, usually takes it subject to the results of the litigation.

#### § 475. The equitable doctrines.

Apart from the recording acts, hereafter to be discussed, and certain statutes in reference to fraudulent conveyances,<sup>1</sup> transfers of the legal title to land rank, between themselves, according to priority in time,—that is, if an owner of land transfers a legal estate to one person, a subsequent attempted transfer of a legal estate of the same or a less quantum to another person necessarily conveys nothing, because the transferrer has nothing to convey. Moreover, apart from statute, one who obtains the conveyance of the legal title for value, and without notice of a prior equity of any sort, takes

<sup>1</sup> Post, §§ 461, 462.



free from that equity, whether it be a trust, an equitable lien, or any other right enforceable in equity alone.<sup>2</sup>

As between interests or claims of a purely equitable character,—that is, enforceable in equity alone,—while, as a general rule, they will be ranked according to the time of accrual, this is by no means always so, equity frequently postponing an earlier to a later claim, the rule being that only as between equal equitable claims, or “equities,” as they are usually called, will priority of time give priority of right. Consequently, the equity prior in time may be deferred from considerations of the respective natures of the two equities, as when a mere gift is postponed to a subsequent trust or lien created for a valuable consideration. Likewise, the equity prior in time may be postponed because the person entitled thereto was guilty of fraud or negligence. Finally, a court of equity may, under certain peculiar circumstances, refuse to enforce a claim, though prior in time, as against the holder of a title or claim subsequently obtained, on the ground that the holder of the latter is a “purchaser for value without notice,”—that is, that he obtained his right not only by paying value, but without notice of the prior equity.<sup>3</sup>

While the absence of notice may have the effect of preventing the enforcement of an equity as against the holder of the subsequent equity, courts of equity have also adopted and unfailingly enforced the rule that, if the holder of the subsequent equity, even though he be a purchaser for value,

<sup>2</sup> 2 Pomeroy, Eq. Jur. § 767; *Fahn v. Bleckley*, 55 Ga. 81; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209; *Gray v. Coan*, 40 Iowa, 327; *Hoult v. Donahue*, 21 W. Va. 294; *Carlisle v. Jumper*, 81 Ky. 282.

<sup>3</sup> Snell, Principles of Eq. (4th Ed.) 23-42; 2 Pomeroy, Eq. Jur. §§ 591-785. This latter work, containing, as it does, a most admirable discussion of the equitable doctrines above referred to, and also of their modification by the recording acts, has furnished much of the material for this chapter.

does, at the time of obtaining such equity, have notice of the prior equity, he takes subject thereto.

The equitable rule just referred to, by which one who takes an interest with notice of a prior equity takes subject thereto, is not confined to the case of a purchaser of an equity, but is also applied as against a purchaser of the legal title with notice of a prior equity,—that is, it is a general rule in equity that one who takes an interest with notice of an outstanding adverse interest takes subject thereto.

### § 476. The recording acts.

The rule above referred to, that, as between conveyances of the legal title, the first in time must prevail, has been entirely changed by the recording acts, which exist in every state, and which provide in effect that a conveyance or mortgage of land, and frequently any other instrument affecting land, shall not, as against a subsequent conveyance or mortgage in favor of a purchaser for value, be valid, unless it is filed for record in a public record office. Usually this requirement of record is for the protection of subsequent purchasers only, and the failure to record the instrument in no way affects the passing of the title as between the parties.<sup>4</sup>

The construction placed by the courts upon the recording acts has been in effect to make the record of an instrument in accordance with the act equivalent to notice, to every subsequent purchaser, of the existence and contents of the instrument, irrespective of whether he actually examines the

<sup>4</sup> See 1 Stimson's Am. St. Law, § 1611(B); Warnock v. Harlow, 96 Cal. 298, 31 Am. St. Rep. 209; Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 381; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; McLaughlin v. Ihmsen, 85 Pa. St. 364.

In Maryland, the instrument must be recorded to pass title. Nickel v. Brown, 75 Md. 172. And so record may be required in order to give validity to a particular conveyance, as one by a married woman. Rorer's Heirs v. Roanoke Nat. Bank, 83 Va. 589.

records so as to obtain such information;<sup>5</sup> the recording acts being thus in effect made to involve an application and extension of the pre-existing doctrine that a purchaser with notice of a prior right takes subject to such right.

Though by some of the earlier decisions the record of an equitable title was not regarded as sufficient to affect a subsequent purchaser with notice thereof, the rule is now generally settled otherwise, sometimes by express statutory provision, and consequently a purchaser of a title, legal or equitable, takes subject to an instrument, creating or transferring an equity, which has been recorded.<sup>6</sup>

In many states the statute requires that a power of attorney shall be recorded in order to render the record of a conveyance made under such power effective as notice to subsequent purchasers.<sup>7</sup> In the absence of such statutory requirement there is no necessity, it seems, of recording the power, since the conveyance puts the purchaser on inquiry as to the authority of the agent or attorney.<sup>8</sup> The revocation of a power of attorney is also frequently required to be recorded in order to be valid, if the power itself has been recorded.<sup>9</sup>

The practical effect of the recording acts is that an in-

<sup>5</sup> 2 Pomeroy, Eq. Jur. § 649; 2 White & T. Lead. Cas. Eq. 203; Webb, Record of Title, § 4.

<sup>6</sup> Russell's Appeal, 15 Pa. St. 319, 6 Gray's Cas. 387; General Ins. Co. of Maryland v. United States Ins. Co. of Baltimore, 10 Md. 517, 69 Am. Dec. 174; Edwards v. McKernan, 55 Mich. 520; Wilder v. Brooks, 10 Minn. 50 (Gil. 32), 88 Am. Dec. 49; Herrington v. Williams, 31 Tex. 448; Hunt v. Johnson, 19 N. Y. 279; Tarbell v. West, 86 N. Y. 280; O'Neal v. Seixas, 85 Ala. 80; Fish v. Benson, 71 Cal. 428; Bailey v. Myrick, 50 Me. 171; Smith v. Neilson, 13 Lea (Tenn.) 461; Webb, Record of Title, § 36.

<sup>7</sup> 1 Stimson's Am. St. Law, § 1624(10), 1670.

<sup>8</sup> See Anderson v. Dugas, 29 Ga. 440; Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Wilson v. Troup, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458.

<sup>9</sup> 1 Stimson's Am. St. Law, § 1673.

tending purchaser of land may, by reference to the record, determine whether his vendor has previously disposed of any interest in the land, and also ascertain both the person from whom his vendor obtained the land, and whether such person disposed of any interest to a person other than such vendor, and so, in the case of each of the successive owners of the land, determine whether, during the period of his ownership, he created any interest not vested in the present vendor. The names of such successive owners of the land constitute what is usually known as "the chain of title."

Since the recording acts have been construed as charging a purchaser with notice of a recorded instrument, on the theory that, if he exercised proper diligence, he would, by searching the records, discover the existence and terms of such instrument, he has, on the same theory, been held not to be charged with notice when his failure to discover the recorded instrument was not owing to lack of diligence. Accordingly, intending purchasers have been regarded as charged with notice, not of all instruments which appear on the record as affecting the land, but of those only which appear there as having been made by a person in the chain of title,—that is, if there be another and independent chain of title upon the records, a purchaser is not affected with notice of the instruments contained therein, since there is no clue calling his attention to such instruments. For instance, A. purchasing from B. is not affected with notice of a conveyance, previously recorded, from C. to D., unless B.'s title appears on the record to be derived through C.<sup>10</sup>

<sup>10</sup> 2 Pomeroy, Eq. Jur. §§ 658, 761; Lumpkin v. Adams, 74 Tex. 97; Blake v. Graham, 6 Ohio St. 580, 67 Am. Dec. 360; Hetherington v. Clark, 30 Pa. St. 393; City of Chicago v. Witt, 75 Ill. 211; Page v. Waring, 76 N. Y. 463; Roberts v. Bourne, 23 Me. 165, 39 Am. Dec. 614.

So, if a conveyance from A. is not recorded, the fact that a conveyance from the grantee therein to another is recorded will not

A purchaser is not, as a general rule, charged with notice of a conveyance which is of record, even though made by a person in the chain of title, unless it was made by such person after the time at which the records show him to have obtained the title,—that is, the purchaser is not bound to search the records to determine whether any particular person in the chain of title, previous to obtaining the title, had done any acts which would affect the title.<sup>11</sup> In some states, however, an exception to this rule exists by reason of the application of the rule that an after-acquired title passes by estoppel, it being there held that, when one has made a conveyance which would pass an after-acquired title as against him, it will have the same effect as against a purchaser from him of such after-acquired title, who has no actual notice of the previous conveyance, such purchaser being thus in effect charged with notice of such conveyance by its presence on the records.<sup>12</sup> But occasionally the rule as to the passing of an after-acquired title has not been applied as against a purchaser of such title without notice of the previous con-

affect with notice a person who subsequently obtains a conveyance from the first grantor. *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614; *Frank v. Heidenheimer*, 84 Tex. 642; *Hetherington v. Clark*, 30 Pa. St. 393. And so the record of a conveyance of an equitable title from one who has such title only, while notice to a subsequent purchaser of the same title from the same grantor, is not notice to one who purchases from the person who has the legal title. *Tarbell v. West*, 86 N. Y. 280. Compare *Edwards v. McKernan*, 55 Mich. 520.

<sup>11</sup> *Calder v. Chapman*, 52 Pa. St. 359, 91 Am. Dec. 163, 6 Gray's Cas. 489; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Farmers' Loan & Trust Co. v. Maltby*, 8 Paige (N. Y.) 361; *Page v. Waring*, 76 N. Y. 463; *Frank v. Heidenheimer*, 84 Tex. 642; 2 *Pomeroy*, Eq. Jur. § 658, p. 914, note 1. See note to *Ford v. Unity Church Soc. of St. Joseph*, 23 L. R. A. 565.

<sup>12</sup> *White v. Patten*, 24 Pick. (Mass.) 324, 6 Gray's Cas. 486; *Ayer v. Philadelphia & Boston Brick Co.*, 159 Mass. 84; *Knight v. Thayer*, 125 Mass. 25; *McCusker v. McEvey*, 9 R. I. 528, 10 R. I. 606; *Powers v. Patten*, 71 Me. 583; *Jarvis v. Aikens*, 25 Vt. 635; *Tefft v. Munson*, 57 N. Y. 97.



veyance, it being regarded as contrary to the purpose and spirit of the recording acts to thus hold him bound, at his peril, to examine the records for conveyances outside of the chain of title, for the sake of protecting a previous purchaser who, through his negligent failure to examine the records, obtained a defective title.<sup>13</sup>

By statute in many of the states, a purchaser cannot assert his claim as against a prior unrecorded instrument unless he first record his own conveyance.<sup>14</sup> Apart from such a statutory provision, one may, without recording his conveyance, claim as a purchaser for value without notice as against the prior unrecorded instrument.<sup>15</sup>

#### § 477. Sufficiency of record.

In order that the record of an instrument shall operate as constructive notice to subsequent purchasers, the instrument must be such that its record is authorized. Consequently, if it is not duly executed,<sup>16</sup> or if it is not acknowledged or certified as required by law,<sup>17</sup> its record does not

<sup>13</sup> *Calder v. Chapman*, 52 Pa. St. 359, 6 Gray's Cas. 489; *Bingham v. Kirkland*, 34 N. J. Eq. 229. See *Rawle, Covenants*, §§ 259-261; *Way v. Arnold*, 18 Ga. 181; *Bennett v. Davis*, 90 Me. 457; *Salisbury Sav. Soc. v. Cutting*, 50 Conn. 113, reporter's note; 2 *Smith, Lead. Cas.* 848.

<sup>14</sup> 1 *Stimson's Am. St. Law*, § 1611. See *Simmons v. Stum*, 101 Ill. 454; *Clabaugh v. Byerly*, 7 Gill (Md.) 354, 48 Am. Dec. 575; *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. St. 9; *Westbrook v. Gleason*, 79 N. Y. 23.

<sup>15</sup> *Coster's Ex'rs v. Bank of Georgia*, 24 Ala. 37; *Sanborn v. Adair*, 29 N. J. Eq. 338; *McGuire v. Barker*, 61 Ga. 339; *Steele's Lessee v. Spencer*, 1 Pet. (U. S.) 552; *Miller v. Merine* (C. C.) 43 Fed. 261; *Webb, Record of Title*, §§ 13, 166.

<sup>16</sup> *Carter v. Champion*, 8 Conn. 549, 21 Am. Dec. 695; *Parret v. Shaubhut*, 5 Minn. 323 (Gil. 258), 80 Am. Dec. 424; *Van Thorniley v. Peters*, 26 Ohio St. 471; *Racouillat v. Sansevain*, 32 Cal. 376; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

<sup>17</sup> *Graves v. Graves*, 6 Gray (Mass.) 391, 6 Gray's Cas. 401; *Heister*

operate as constructive notice to subsequent purchasers. Moreover, in order to give priority as against a subsequent purchaser, the instrument must describe the land with sufficient accuracy to enable one examining the record to identify the land.<sup>18</sup>

An index of the grantors and grantees as named in the recorded conveyance is ordinarily kept in the record office, and the statute frequently so requires.<sup>19</sup> In some states the index is in effect part of the record, so that, although the conveyance is recorded, it is not notice to a subsequent purchaser unless it appears correctly on the index.<sup>20</sup> In other states a purchaser is bound by the prior conveyance, even though it is not indexed, or is indexed under a wrong name.<sup>21</sup>

The courts of the different states are divided upon the question as to who must suffer the loss occasioned by an error made by the officer in recording a conveyance deposited with him for record. Some courts hold that a grantee, by lodging the instrument with the proper officer for record,

*v. Fortner*, 2 Binn. (Pa.) 40, 4 Am. Dec. 417, 6 Gray's Cas. 390; *Fryer v. Rockefeller*, 63 N. Y. 268; *Fleschner v. Sumpter*, 12 Or. 161; *Raines v. Walker*, 77 Va. 92; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Girardin v. Lampe*, 58 Wis. 267; *Hayden v. Moffatt*, 74 Tex. 647, 15 Am. St. Rep. 866; *Herndon v. Kimball*, 7 Ga. 432, 50 Am. Dec. 406; *Cockey v. Milne's Lessee*, 16 Md. 200.

<sup>18</sup> *Bright v. Buckman* (C. C.) 39 Fed. 247; *Rodgers v. Cavanaugh*, 24 Ill. 583; *Bailey v. Galpin*, 40 Minn. 319; *Banks v. Ammon*, 27 Pa. St. 172; *Chamberlain v. Bell*, 7 Cal. 292, 68 Am. Dec. 260. See *Carter v. Hawkins*, 62 Tex. 393.

<sup>19</sup> 1 Stimson's Am. St. Law, § 1620.

<sup>20</sup> *Barney v. McCarty*, 15 Iowa, 510, 6 Gray's Cas. 413; *Lombard v. Culbertson*, 59 Wis. 433; *Ritchie v. Griffiths*, 1 Wash. St. 429, 22 Am. St. Rep. 155.

<sup>21</sup> *Curtis v. Lyman*, 24 Vt. 338, 58 Am. Dec. 174, 6 Gray's Cas. 405; *Mutual Life Ins. Co. of New York v. Dake*, 87 N. Y. 257; *Green v. Garrington*, 16 Ohio St. 548, 91 Am. Dec. 103; *Stockwell v. McHenry*, 107 Pa. St. 237, 52 Am. Rep. 475; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Chatham v. Bradford*, 50 Ga. 327, 15 Am. Rep. 692; *Davis v. Whitaker*, 114 N. C. 279.

acquits himself of all responsibility as to the actual recording, and that from that time it is notice to subsequent purchasers of what it contains, and not of what the recording officer may make it show on the record.<sup>22</sup> Other courts hold that subsequent purchasers are bound only by what the record shows, and that the grantee in a conveyance, in order to absolutely guard against mistakes by the recorder, which will jeopardize his rights as against subsequent purchasers, must ascertain that the recording is correctly done.<sup>23</sup>

**§ 478. Persons affected with notice by record.**

The recording acts usually in terms require the record of an instrument for the benefit of a subsequent purchaser or incumbrancer only. Consequently, one who has previously acquired an interest in the land, or who is a party to the instrument itself, is not charged with notice of any facts by the record.<sup>24</sup> So, a mortgagee of the land need not, except for the purpose of foreclosure, examine the records subse-

<sup>22</sup> *Mangold v. Barlow*, 61 Miss. 593, 48 Am. Rep. 84; *Mims v. Mims*, 35 Ala. 23, 6 Gray's Cas. 409; *Merrick v. Wallace*, 19 Ill. 486; *Lewis v. Hinman*, 56 Conn. 55; *Gillespie v. Rogers*, 146 Mass. 610; *Schell v. Stein*, 76 Pa. St. 398; *Wood's Appeal*, 82 Pa. St. 116.

<sup>23</sup> *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 288, 6 Gray's Cas. 403; *Beekman v. Frost*, 18 Johns. (N. Y.) 544; *New York Life Ins. Co. v. White*, 17 N. Y. 469; *Miller v. Bradford*, 12 Iowa, 14, 6 Gray's Cas. 410; *Barnard v. Campau*, 29 Mich. 162; *Jennings' Lessee v. Wood*, 20 Ohio, 261; *Sawyer v. Adams*, 8 Vt. 172, 30 Am. Dec. 459; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Shepherd v. Burkhalter*, 13 Ga. 443, 58 Am. Dec. 523; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Ritchie v. Griffiths*, 1 Wash. St. 429, 22 Am. St. Rep. 155. But as to New York, see *Mutual Life Ins. Co. of New York v. Dake*, 87 N. Y. 257.

<sup>24</sup> *Webb*, Record of Title, § 163; 2 Pomeroy, Eq. Jur. § 657; *Stuyvesant v. Hone*, 1 Sandf. Ch. (N. Y.) 419; *Stuyvesant v. Hall*, 2 Barb. Ch. (N. Y.) 151; *Davis v. Monroe*, 187 Pa. St. 212, 67 Am. St. Rep. 581; *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101; *Corey v. Smalley*, 106 Mich. 257, 58 Am. St. Rep. 474; *Holley v. Hawley*, 39 Vt. 525, 94 Am. Dec. 350.

quent to his mortgage before taking any action in connection with his mortgage.<sup>25</sup>

**§ 479. Notice as substitute for recording.**

The statutes requiring a record of a conveyance in order to make it effective as against a subsequent purchaser have almost invariably been construed as not applying in favor of one who has notice of a prior unrecorded conveyance.<sup>26</sup> This seems to be merely a logical result of the construction put upon the recording acts as making record of an instrument equivalent to notice thereof on the part of a subsequent purchaser, since this construction implies that notice otherwise obtained will have the same effect.<sup>27</sup> In many cases, however, the rule that notice otherwise obtained is sufficient, though the prior instrument was not recorded, is based upon the theory that the taking of a conveyance with the purpose of impairing prior rights of which he has notice constitutes a fraud, this view being adopted from the decisions of the English courts in connection with the local registration acts of that country.<sup>28</sup> In many of the statutes it is expressly provided that the conveyance must be recorded only as against

<sup>25</sup> *George v. Wood*, 9 Allen (Mass.) 80, 6 Gray's Cas. 492; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108; *Heaton v. Prather*, 84 Ill. 330; *Birnie v. Main*, 29 Ark. 591. See post, § 536. So, a judgment lienor may release part of his lien without first examining the records to see how it will affect other persons. *Taylor's Ex'rs v. Maris*, 5 Rawle (Pa.) 51.

<sup>26</sup> 2 Pomeroy, Eq. Jur. § 649; *Webb*, Record of Title, § 201; 2 White & T. Lead. Cas. Eq. 213; *Lamont v. Cheshire*, 65 N. Y. 30.

In two states the statute has been construed as so absolutely requiring the record of a mortgage as to make it invalid even as against a subsequent purchaser having actual notice thereof. *Mayham v. Coombs*, 14 Ohio, 428, 6 Gray's Cas. 441; *Home Building & Loan Ass'n of Columbus v. Clark*, 43 Ohio St. 427; *Quinnerly v. Quinnerly*, 114 N. C. 145.

<sup>27</sup> 2 Pomeroy, Eq. Jur. § 665.

<sup>28</sup> 2 Pomeroy, Eq. Jur. §§ 659, 660; 2 White & T. Lead. Cas. Eq. 213.

a purchaser "with notice," or "with actual notice," or equivalent expressions are used.<sup>29</sup>

In the majority of the states it is sufficient, in order to deprive a person of the right to claim as against a prior unrecorded conveyance, that he has either actual knowledge of such conveyance, or that he has information sufficient to put him on inquiry in regard to such conveyance, and this construction has been given even to statutes which provide that an unrecorded conveyance shall be void except as against persons having "actual notice."<sup>30</sup> But in one state, at least, such a statutory requirement of "actual notice" has been held to involve the necessity of actual knowledge of the prior conveyance.<sup>31</sup> That information sufficient to put one on inquiry in regard to an adverse right is *prima facie* sufficient to charge one with notice of such right is a principle well settled in equity, without reference to the recording acts, and the question as to what constitutes such knowledge in connection with these acts, when actual knowledge is not required, is determined by an application of equitable considerations.

The information thus sufficient to put one on inquiry may consist of a statement made by the claimant of the adverse right,<sup>32</sup> or by a third person not pecuniarily interested, if

<sup>29</sup> See 1 Stimson's Am. St. Law, § 1611; 2 Pomeroy, Eq. Jur. § 646, and notes; Webb, Record of Title, § 222.

<sup>30</sup> Williamson v. Brown, 15 N. Y. 354, 6 Gray's Cas. 449; Maupin v. Emmons, 47 Mo. 304, 6 Gray's Cas. 458; Drey v. Doyle, 99 Mo. 459; Erickson v. Rafferty, 79 Ill. 209; Clark v. Holland, 72 Iowa, 34; Knapp v. Bailey, 79 Me. 195; Brinkman v. Jones, 44 Wis. 498; Gaines v. Summers, 50 Ark. 322; Hunt v. Dunn, 74 Ga. 124; Musgrove v. Bonser, 5 Or. 313, 20 Am. Rep. 737; Greer v. Higgins, 20 Kan. 420.

<sup>31</sup> Lamb v. Pierce, 113 Mass. 72, 6 Gray's Cas. 462; Pomroy v. Stevens, 11 Metc. (Mass.) 244, 6 Gray's Cas. 446. See 2 White & T. Lead. Cas. Eq. 218.

<sup>32</sup> Davis v. Kennedy, 105 Ill. 300; Nelson v. Sims, 23 Miss. 383, 57 Am. Dec. 144; Epley v. Witherow, 7 Watts (Pa.) 163.



he is in a position to know the facts, and his statement is definite.<sup>33</sup> The information must be sufficient to furnish a basis for investigation, and a mere rumor or indefinite statement that there is an adverse claim is not sufficient to put one on inquiry.<sup>34</sup> Knowledge by the purchaser of the condition of the land, as by the presence of structures thereon, may likewise be sufficient to put him on inquiry as to whether this does not indicate the existence of some adverse right or easement.<sup>35</sup> The fact that a purchaser obtains the property at a very inadequate price is also, it is said, a fact which should put him on inquiry, and is accordingly at least evidence of notice by him of an adverse claim.<sup>36</sup>

If one put on inquiry makes such investigation as may reasonably be demanded of a person of ordinary diligence and understanding, and fails to ascertain the existence of the adverse claim, the presumption of notice is rebutted.<sup>37</sup> In some cases, however, the circumstances may be such that a diligent inquiry would necessarily involve the ascertainment

<sup>33</sup> *Butcher v. Yocum*, 61 Pa. St. 168, 100 Am. Dec. 625; *Lawton v. Gordon*, 37 Cal. 202; *Jackson, L. & S. R. Co. v. Davison*, 65 Mich. 416, 447; *Jaeger v. Hardy*, 48 Ohio St. 335; *Cox v. Milner*, 23 Ill. 476; *Curtis v. Mundy*, 3 Metc. (Mass.) 405; 1 *White & T. Lead. Cas. Eq.* 147.

<sup>34</sup> *Maul v. Rider*, 59 Pa. St. 167; *Condit v. Wilson*, 36 N. J. Eq. 370; *Buttrick v. Holden*, 13 Metc. (Mass.) 355; *Loughridge v. Bowland*, 52 Miss. 546; *Shepard v. Shepard*, 36 Mich. 173; *Tompkins v. Henderson*, 83 Ala. 391; *City of Chicago v. Witt*, 75 Ill. 211; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167.

<sup>35</sup> *Webb v. Robbins*, 77 Ala. 176; *Blatchley v. Osborn*, 33 Conn. 226; *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112; *Randall v. Silverthorn*, 4 Pa. St. 173; *Paul v. Connersville & N. J. R. Co.*, 51 Ind. 527.

<sup>36</sup> *Durant v. Crowell*, 97 N. C. 367; *Lounsbury v. Norton*, 59 Conn. 170; *Hoppin v. Doty*, 25 Wis. 573.

<sup>37</sup> *Williamson v. Brown*, 15 N. Y. 354, 6 *Gray's Cas.* 449; *Gregory v. Savage*, 32 Conn. 250; *Thompson v. Pioche*, 44 Cal. 508; *Schweiss v. Woodruff*, 73 Mich. 473; *Cavin v. Middleton*, 63 Iowa, 618; 2 *Pome-roy, Eq. Jur.* § 607.

of the adverse claim, and in such case the presumption of notice may be regarded as conclusive.<sup>38</sup> Each case must, to a very considerable degree, depend upon its own peculiar circumstances, and it is impossible to frame any absolute rule by which to determine whether an intending purchaser has sufficient information to put him on inquiry, and what constitutes due and sufficient inquiry.

—— **Notice to agent.**

The rule that notice to an agent is notice to his principal applies in the case of a purchaser of land acting through an agent, and he may consequently be charged with notice of adverse claims either by the agent's actual knowledge, or by information acquired by the latter sufficient to put him on inquiry.<sup>39</sup> The limitations upon the general rule in connection with the time of the acquisition of notice by the agent, and the character of the transaction in connection with which the notice is received, are by no means settled, and are properly a matter for consideration in a treatise on agency. It is held by some courts that notice acquired by the agent before the beginning of the agency is in no case to be imputed to the principal;<sup>40</sup> while other courts hold that such notice is to be imputed to the principal, provided the fact of which he has received notice is present in his mind while acting for the principal,<sup>41</sup> and provided he is at liberty

<sup>38</sup> 2 Pomeroy, Eq. Jur. § 608.

<sup>39</sup> *Clark v. Fuller*, 39 Conn. 238; *Smith v. Dunton*, 42 Iowa, 48; *Hickman v. Green*, 123 Mo. 165; *Cowan v. Withrow*, 111 N. C. 306; *Bigley v. Jones*, 114 Pa. St. 510; *Russell v. Swezey*, 22 Mich. 235.

<sup>40</sup> *Huffcutt*, Agency (2d Ed.) § 144; *Houseman v. Girard Mut. Building & Loan Ass'n*, 81 Pa. St. 256; *Kauffman v. Robey*, 60 Tex. 308, 48 Am. Rep. 264; *McCormick v. Joseph*, 83 Ala. 401.

<sup>41</sup> *Distilled Spirits*, 11 Wall. (U. S.) 356; *Arrington v. Arrington*, 114 N. C. 151; *Constant v. University of Rochester*, 111 N. Y. 604.

to disclose it to the principal.<sup>42</sup> Notice of a fact to the agent will not in any case bind the principal if the fact is not within the scope of the agency.<sup>43</sup> Nor is the principal charged with notice if the agent is acting in fraud of the principal, and, to further his own ends, conceals the fact from the principal.<sup>44</sup>

**§ 480. Notice from possession.**

An intending purchaser of land is, as a general rule, by the fact that the land is in the possession of a person other than he who is undertaking to sell it, charged with notice of the rights of such person, to the extent that he could, by reasonable inquiry, have ascertained the nature of such rights.<sup>45</sup> This presumption of notice exists, even though the intending purchaser is a nonresident, or for other reasons is without actual knowledge of the possession by a third person.<sup>46</sup>

<sup>42</sup> *Distilled Spirits*, 11 Wall. (U. S.) 356; *Littauer v. Houck*, 92 Mich. 162.

<sup>43</sup> *Trentor v. Pothén*, 46 Minn. 298; *Pringle v. Dunn*, 37 Wis. 449; *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115; *Tucker v. Tillotson*, 55 N. H. 223; *Roach v. Karr*, 18 Kan. 529; *Wood v. Rayburn*, 18 Or. 3.

<sup>44</sup> 2 *Pomeroy*, Eq. Jur. §§ 674, 675; *National Life Ins. Co. of United States v. Minch*, 53 N. Y. 144; *Hickman v. Green*, 123 Mo. 165; *Frenkel v. Hudson*, 82 Ala. 158; *Allen v. South Boston R. Co.*, 150 Mass. 200, 15 Am. St. Rep. 185.

<sup>45</sup> *Kirby v. Tallmadge*, 160 U. S. 379; *Rorer Iron Co. v. Trout*, 83 Va. 397, 5 Am. St. Rep. 285; *Pleasants v. Blodgett*, 39 Neb. 741, 42 Am. St. Rep. 624; *Strickland v. Kirk*, 51 Miss. 795; *Truesdale v. Ford*, 37 Ill. 210; *Phelan v. Brady*, 119 N. Y. 587; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Williamson v. Brown*, 15 N. Y. 354, 6 Gray's Cas. 449; *Maupin v. Emmons*, 47 Mo. 304, 6 Gray's Cas. 458; *Toland v. Corey*, 6 Utah, 392.

<sup>46</sup> *Hodge's Ex'rs v. Amerman*, 40 N. J. Eq. 99; *Edwards v. Thompson*, 71 N. C. 177; *Hottenstein v. Lerch*, 104 Pa. St. 454; *Tillotson v. Mitchell*, 111 Ill. 518; *Ranney v. Hardy*, 43 Ohio St. 157; *Sheorn v. Robinson*, 22 S. C. 32; *Hyde v. Mangan*, 88 Cal. 319; *Woodson v. Col-* (1088)

The possession of one whose title is of record is not, however, notice of any rights in him other than those that appear of record, the purchaser being justified in attributing his possession to his record title.<sup>47</sup> By some courts it is held that the continuance in possession by a grantor, after conveying the land, is, like the possession of any other person, sufficient to put a subsequent purchaser on inquiry, and so affect him with notice of any rights reserved by the grantor.<sup>48</sup> Other courts take the view that any subsequent purchaser from the grantee is entitled to rely upon the conveyance purporting to dispose of all the grantor's title, and that consequently he is justified in assuming, without inquiry, that the possession of the grantor is by sufferance of the grantee, and does not indicate the existence of any rights in him.<sup>49</sup>

By the majority of the decisions, a purchaser is not only charged with the rights of the person in possession, but, if such person is tenant under another, he is charged with notice of the rights of such other.<sup>50</sup>

lins, 56 Tex. 168; *Phelan v. Brady*, 119 N. Y. 587; *Galley v. Ward*, 60 N. H. 33. See *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 442.

To satisfy a requirement of "actual notice" in the recording acts, a knowledge by the purchaser of the possession has been held to be necessary. *Brinkman v. Jones*, 44 Wis. 498. See *Porter v. Sevey*, 43 Me. 519; *Harral v. Leverty*, 50 Conn. 46.

<sup>47</sup> *Plumer v. Robertson*, 6 Serg. & R. (Pa.) 184; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Great Falls Co. v. Worster*, 15 N. H. 412; *Fargason v. Edrington*, 49 Ark. 207.

<sup>48</sup> *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *Pell v. McElroy*, 36 Cal. 268; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646; *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35; *Daubenspeck v. Platt*, 22 Cal. 330; *New v. Wheaton*, 24 Minn. 406.

<sup>49</sup> *Van Keuren v. Central R. Co. of New Jersey*, 38 N. J. Law, 165; *Bloomer v. Henderson*, 8 Mich. 395, 77 Am. Dec. 453; *Koon v. Tramel*, 71 Iowa, 132; *Haftor v. Strange*, 65 Miss. 323, 7 Am. St. Rep. 659; *Eylar v. Eylar*, 60 Tex. 315.

<sup>50</sup> *Hanly v. Morse*, 32 Me. 287; *Brunson v. Brooks*, 68 Ala. 248; *O'Rourke v. O'Connor*, 39 Cal. 442; *Tillotson v. Mitchell*, 111 Ill. 523; *Phelan v. Brady*, 119 N. Y. 587; *Glendenning v. Bell*, 70 Tex. 632;

The possession, to charge a purchaser with notice, must be an actual and visible possession,<sup>51</sup> and must not be in connection with another person who appears from the records to have the title, since the purchaser is then justified in assuming that the possession is based on the permission of the latter.<sup>52</sup>

The presumption of notice of the rights of a third person arising from his possession, or from the possession of his tenant, is not, by the weight of authority, conclusive, and the purchaser may show that he made due inquiry, from all accessible sources of information, as to the rights of such person in possession, and had reason to believe that such person was in possession merely under the vendor, and claimed no rights.<sup>53</sup>

**§ 481. Notice from statements in instruments of title.**

A purchaser of land is affected with notice of all matters stated or referred to in the conveyances or other instruments, of which he has actual or constructive notice, as being recorded or otherwise, so far as those statements or references may possibly affect the title, and he is bound to

*Hottenstein v. Lerch*, 104 Pa. St. 454; *Wilkins v. Bevier*, 43 Minn. 213, 19 Am. St. Rep. 238; 2 Pomeroy, Eq. Jur. § 625.

<sup>51</sup> *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489; *McMechan v. Griffing*, 3 Pick. (Mass.) 149, 15 Am. Dec. 198; *Mason v. Mullahy*, 145 Ill. 383; *Ranney v. Hardy*, 43 Ohio St. 157; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 442.

<sup>52</sup> *Bell v. Twilight*, 22 N. H. 500; *Butler v. Stevens*, 26 Me. 484; *Billington's Lessee v. Welsh*, 5 Binn. (Pa.) 132, 6 Am. Dec. 406; *Townsend v. Little*, 109 U. S. 510; *Harris v. McIntyre*, 118 Ill. 275; *Lindley v. Martindale*, 78 Iowa, 379; *Watt v. Parsons*, 73 Ala. 202; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Pope v. Allen*, 90 N. Y. 298.

<sup>53</sup> *Williamson v. Brown*, 15 N. Y. 354, 6 Gray's Cas. 449; *Trumppower v. Marcey*, 92 Mich. 529; *Hellman v. Levy*, 55 Cal. 117; *Rogers v. Jones*, 8 N. H. 264; 2 Pomeroy, Eq. Jur. §§ 623, 624; 2 White & T. Lead. Cas. Eq. 182.



make any inquiries or researches suggested by such statements or references.<sup>54</sup> He is not, however, so charged with notice of matters contained in a conveyance which is not a part of the chain of title under which he claims, and which is not referred to in any instrument constituting a part of such chain.<sup>55</sup> Notice thus acquired by references in the chain of title is sufficient to defeat any claim of priority based upon the failure to record the previous conveyance,<sup>56</sup> even, it seems, when the statute invalidates such unrecorded conveyance except as against one having "actual" notice.<sup>57</sup>

§ 482. Purchasers under particular classes of conveyances.

In some states the grantee in a quitclaim deed, which purports to convey only such right and title as the grantor has, cannot claim priority, as a *bona fide* purchaser, over a previous conveyance, which has not been recorded, the theory being that the purchaser is, by the form of the instrument, charged with notice that there is some outstanding claim or interest.<sup>58</sup> This view, however, has been repudiated in other

<sup>54</sup> *McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826; *Sioux City & St. P. R. Co. v. Singer*, 49 Minn. 301, 32 Am. St. Rep. 554; *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538; *Crawford v. Chicago, B. & Q. R. Co.*, 112 Ill. 314; *Gaines v. Summers*, 50 Ark. 322; *Smith v. Burgess*, 133 Mass. 513; *Buchanan v. Balkum*, 60 N. H. 406; 2 *Pomeroy*, Eq. Jur. §§ 626-631.

<sup>55</sup> *Hetherington v. Clark*, 30 Pa. St. 393; *Grundies v. Reid*, 107 Ill. 304; *Ely v. Wilcox*, 20 Wis. 523; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Knox County v. Brown*, 103 Mo. 223.

<sup>56</sup> *Rosser v. Cheney*, 61 Ga. 468; *McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826; *Morris v. Hogle*, 37 Ill. 150, 87 Am. Dec. 243; *Parke v. Neeley*, 90 Pa. St. 52; *Bronson v. Wanzer*, 86 Mo. 408.

<sup>57</sup> *George v. Kent*, 7 Allen (Mass.) 16, 6 Gray's Cas. 457; *Sargent v. Hubbard*, 102 Mass. 380; *Hamilton v. Nutt*, 34 Conn. 501; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

<sup>58</sup> *Marshall v. Roberts*, 18 Minn. 405 (Gil. 365), 6 Gray's Cas. 425; *Peters v. Cartier*, 80 Mich. 124, 20 Am. St. Rep. 508; *Johnson v. Williams*, 37 Kan. 179, 1 Am. St. Rep. 243; *Garrett v. Christopher*, 74 Tex. 454, 15 Am. St. Rep. 850; *Baker v. Woodward*, 12 Or. 3; *Steele*

jurisdictions as not justified by the purpose or the language of a quitclaim deed.<sup>59</sup> And even in states in which the grantee himself in a quitclaim deed is charged with notice of an adverse right, a purchaser from him for value is not so charged, since otherwise the occurrence of one quitclaim deed in the chain of title would to a great extent render such a title unmarketable.<sup>60</sup>

A conveyance purporting to convey land by a general description, such as "all my land," or "all the land which I have," or "all which I now have," in a certain place, does not, it has been held, take precedence of a prior unrecorded conveyance of particular land in such place, the evident intent being to convey only such land as the grantor still retains.<sup>61</sup>

By some courts it has been held that a purchaser from an

v. Sioux Valley Bank, 79 Iowa, 339, 18 Am. St. Rep. 370; Meikel v. Borders, 129 Ind. 529.

<sup>59</sup> Moelle v. Sherwood, 148 U. S. 21; Chapman v. Sims, 53 Miss. 154; Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316; Frey v. Clifford, 44 Cal. 335; Nidever v. Ayers, 83 Cal. 39; Brown v. Banner Coal & Coal Oil Co., 97 Ill. 214, 37 Am. Rep. 105.

That a sheriff's conveyance of "all the right, title, and interest" of the execution creditor in certain described land does not deprive the purchaser of his rights as against a prior unrecorded conveyance, see Woodward v. Sartwell, 129 Mass. 210, and Parker v. Prescott, 87 Me. 444; and that a conveyance by a private grantor in the same terms does not have such effect, see Dow v. Whitney, 147 Mass. 1, 6 Gray's Cas. 434. The fact that the conveyance is by quitclaim may, however, be considered on the issue of good faith. Post v. Inhabitants of Foxborough, 131 Mass. 202.

<sup>60</sup> Winkler v. Miller, 54 Iowa, 476; Meikel v. Borders, 129 Ind. 529; Snowden v. Tyler, 21 Neb. 199; Sherwood v. Moelle (C. C.) 36 Fed. 478.

<sup>61</sup> Fitzgerald v. Libby, 142 Mass. 235, 6 Gray's Cas. 427; Callanan v. Merrill, 81 Iowa, 73; Coe v. Persons Unknown, 43 Me. 432; Eaton v. Trowbridge, 38 Mich. 454. See Butterfield v. Smith, 11 Ill. 485. In Hetherington v. Clark, 30 Pa. St. 393, the question whether such a conveyance was intended to convey only such land as the grantor still retained was regarded as a question for the jury.

heir or devisee takes subject to a conveyance by the ancestor, which was not recorded, on the theory that he undertakes to purchase merely the interest which the heir or devisee has.<sup>62</sup> But in other states it has been held more consistently, it would seem, with the policy of the recording laws, that a purchaser from an heir or devisee is, like a purchaser from any other person, entitled to rely upon the title as it appears of record.<sup>63</sup>

### § 483. Purchasers for value.

In order to claim priority as against one whose rights have first accrued, one must be a purchaser for value, and one who receives a conveyance based on a merely "good," as distinguished from a "valuable," consideration, takes subject to all prior conveyances or incumbrances. This is a principle of equity, independent of statute, but the recording acts usually in terms require record of a conveyance only as against purchasers for valuable consideration, and, in the absence of such an express declaration, the statutes have uniformly been so construed.<sup>64</sup> One is not a purchaser for a valuable consideration, within the rule, unless he has parted with money or money's worth in consideration of the conveyance.<sup>65</sup>

The question in regard to a conveyance by a debtor to a creditor—that is, whether an "antecedent" consideration is a valuable one—is viewed differently by different courts. By perhaps the weight of authority, a conveyance made merely to

<sup>62</sup> *Hancock v. Beverly's Heirs*, 6 B. Mon. (Ky.) 531; *Hill v. Meeker*, 24 Conn. 211. Compare *Harlan's Heirs v. Seaton's Heirs*, 18 B. Mon. (Ky.) 312.

<sup>63</sup> *Earle v. Fiske*, 103 Mass. 491, 6 Gray's Cas. 423; *Youngblood v. Vastine*, 46 Mo. 239; *Kennedy v. Northup*, 15 Ill. 148; *Powers v. McFerran*, 2 Serg. & R. (Pa.) 47; *McCulloch's Lessee v. Eudaly*, 3 Yerg. (Tenn.) 346.

<sup>64</sup> See 2 Pomeroy, Eq. Jur. §§ 656, 746-751; 1 Stimson's Am. St. Law, § 1611; Webb, Record of Title, § 204.

<sup>65</sup> 2 Pomeroy, Eq. Jur. § 747; Webb, Record of Title, § 204.

secure the payment of the debt is not sufficient to protect the purchaser as against rights previously accrued,<sup>66</sup> though there are decisions to the contrary.<sup>67</sup> On the other hand, a conveyance not to secure the debt, but in satisfaction of it,<sup>68</sup> or to obtain an extension,<sup>69</sup> has more usually been regarded as based on a valuable consideration.

A purchaser who has not paid the consideration before receiving notice of the earlier conveyance or incumbrance cannot claim priority thereto, even though he has received a transfer of the legal title.<sup>70</sup> If he has paid part of the consideration before receiving notice, he will, by the weight of authority, be protected to the extent of the amount so paid.<sup>71</sup>

<sup>66</sup> *Weaver v. Barden*, 49 N. Y. 286; *Koon v. Tramel*, 71 Iowa, 132; *Liggett Spring & Axle Co.'s Appeal*, 111 Pa. St. 291; *Goodwin v. Massachusetts Loan & Trust Co.*, 152 Mass. 189; *Union Nat. Bank of Oshkosh v. Oium*, 3 N. D. 193, 44 Am. St. Rep. 533; *Funk v. Paul*, 64 Wis. 35, 54 Am. Rep. 576; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Jones v. Robinson*, 77 Ala. 499; *Chance v. McWhorter*, 26 Ga. 315; *Boxheimer v. Gunn*, 24 Mich. 372.

<sup>67</sup> *Hayner v. Eberhardt*, 37 Kan. 308; *Frey v. Clifford*, 44 Cal. 335; *Cummings v. Boyd*, 83 Pa. St. 372; *Brem v. Lockhart*, 93 N. C. 191.

<sup>68</sup> 2 *Pomeroy*, Eq. Jur. § 749; *State Bank of St. Louis v. Frame*, 112 Mo. 502; *Soule v. Shotwell*, 52 Miss. 236; *Busey v. Reese*, 38 Md. 264; *Hanold v. Kays*, 64 Mich. 439, 8 Am. St. Rep. 835; *Adams v. Vanderbeck*, 148 Ind. 92, 62 Am. St. Rep. 497; *Foorman v. Wallace*, 75 Cal. 552.

<sup>69</sup> *Jones v. Robinson*, 77 Ala. 499; *Koon v. Tramel*, 71 Iowa, 132; *Cary v. White*, 52 N. Y. 138; *Schumpert v. Dillard*, 55 Miss. 348; *Pittsburgh & C. R. Co. v. Barker*, 29 Pa. St. 160; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250.

<sup>70</sup> *Schultze v. Houfes*, 96 Ill. 335; *Brown v. Welch*, 18 Ill. 343, 68 Am. Dec. 549; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Patton v. Moore*, 32 N. H. 382; *Wells v. Morrow*, 38 Ala. 125; *Evans v. Templeton*, 69 Tex. 375, 5 Am. St. Rep. 71; *Lamar's Ex'r v. Hale*, 79 Va. 147; 2 *Pomeroy*, Eq. Jur. §§ 691, 750.

<sup>71</sup> *Webb*, Record of Title, § 206; 2 *Pomeroy*, Eq. Jur. § 750; *Baldwin v. Sager*, 70 Ill. 503; *Birdsall v. Cropsey*, 29 Neb. 679; *Youst v. Martin*, 3 Serg. & R. (Pa.) 423; *Juvenal v. Jackson*, 14 Pa. St. 519, 524; *Marchbanks v. Banks*, 44 Ark. 48.



The fact that the purchaser has given a non-negotiable security for the payment of the price does not constitute him a purchaser for value, since he may be relieved therefrom in equity.<sup>72</sup>

**§ 484. Purchasers with notice from purchasers without notice.**

A purchaser may not only enjoy the property free from any adverse claims of which he had no notice at the time of his purchase, but he may also transfer his rights in this respect to others, and the fact that his alienee himself has notice is immaterial, it being thus the rule that a purchaser with notice from a purchaser without notice has all the rights of the latter.<sup>73</sup> The one exception to this rule exists when the second purchaser is one from whom the purchaser himself derived his title, since otherwise one purchasing with notice could free himself from the effects thereof by conveying the land to an innocent purchaser, and then taking a reconveyance.<sup>74</sup>

**§ 485. Purchasers without notice from purchasers with notice.**

A purchaser of land without notice, either from the records or otherwise, of a prior outstanding claim, is not affected thereby, even though his vendor had actual notice of the claim, since otherwise no person could purchase land with

<sup>72</sup> *Roseman v. Miller*, 84 Ill. 297; *Westbrook v. Gleason*, 79 N. Y. 23; *Beck v. Uhrich*, 13 Pa. St. 636, 53 Am. Dec. 507; *Marchbanks v. Banks*, 44 Ark. 48; *Patten v. Moore*, 32 N. H. 382.

<sup>73</sup> *Harrison v. Forth*, Finch, Prec. Ch. 51; *Whitfield v. Riddle*, 78 Ala. 99; *Roe v. Cato*, 27 Ga. 637; *East v. Pugh*, 71 Iowa, 162; *Bell v. Twilight*, 18 N. H. 159, 45 Am. Dec. 367.

<sup>74</sup> *Clark v. McNeal*, 114 N. Y. 287, 11 Am. St. Rep. 638; *Johnson v. Gibson*, 116 Ill. 294; *Church v. Ruland*, 64 Pa. St. 432; *Huling v. Abbott*, 86 Cal. 423; 1 Story, Eq. Jur. § 410.



any safety, and the purpose of the recording acts would be entirely defeated.<sup>75</sup>

When a purchaser, who records his conveyance before the record of a prior conveyance, nevertheless takes subject thereto because he has actual notice, one who purchases from him subsequent to the recording of the prior conveyance also takes subject thereto. In other words, the last purchaser cannot claim priority by reason of the prior record of the conveyance to his grantor, because his grantor's actual notice rendered the record nugatory, and he cannot claim priority by reason of the record of the conveyance to himself, because such record was subsequent to the record of the prior adverse conveyance.<sup>76</sup> Under this rule, consequently, though one finds, by the index of grantors in the record office, that a particular owner in the chain of title has conveyed the land, a continuance of the search under the name of such grantor down to the time of the search must be made in order to ascertain whether there is another conveyance entitled to priority. Recognizing that this is a hardship upon an intending purchaser, it has been decided in at least one state that, under such a state of facts, the innocent purchaser from a purchaser with actual knowledge is not affected by a conveyance not recorded until after the record of the subsequent conveyance to the latter.<sup>77</sup>

<sup>75</sup> 1 Story, Eq. Jur. § 409; 2 Pomeroy, Eq. Jur. 754; *Roe v. Cato*, 27 Ga. 637.

<sup>76</sup> *Van Rensselaer v. Clark*, 17 Wend. (N. Y.) 25, 31 Am. Dec. 280, 6 Gray's Cas. 479; *Mahoney v. Middleton*, 41 Cal. 41; *Fallass v. Pierce*, 30 Wis. 443; *Erwin v. Lewis*, 32 Wis. 276; *Woods v. Garnett*, 72 Miss. 78; *Van Aken v. Gleason*, 34 Mich. 477; *Bayles v. Young*, 51 Ill. 127, 6 Gray's Cas. 482; 2 Pomeroy, Eq. Jur. § 760.

<sup>77</sup> *Morse v. Curtis*, 140 Mass. 112, 54 Am. Rep. 456, 6 Gray's Cas. 483. In *Day v. Clark*, 25 Vt. 397, this result is attained on the theory that, as a subsequent purchaser with notice from a purchaser without notice takes free from any adverse claim, the last purchaser is, in this case, to be preferred, because he does not know that his grantor did have actual notice of the unrecorded conveyance.

**§ 486. Purchasers at execution sales.**

A purchaser at a sale on execution stands in the position of any other purchaser for value, and takes free from any claims upon the land in favor of third persons, of which he has no notice, actual or constructive, at the time of his purchase.<sup>78</sup> Moreover, even if he has notice of rights in a third person, he takes the land unaffected by such rights, if the rights of the judgment creditor were superior thereto, this being an application of the principle that a purchaser with notice from a purchaser without notice is not affected thereby.<sup>79</sup> Consequently, when, as may be the case in a number of states,<sup>80</sup> the lien of the judgment or execution is superior to an equity or conveyance which is prior in point of time, owing to the want of notice thereof to the judgment creditor, the purchaser under the execution, even though having notice, is not affected by such equity or claim.<sup>81</sup> But if the lien of the judgment or execution is subject to a pre-existing equity or conveyance, either because the judgment creditor had notice thereof, or because such is the law of the state,<sup>82</sup> the purchaser at execution sale, if he has notice of such outstanding rights in a third person, takes subject thereto.<sup>83</sup>

<sup>78</sup> *Maupin v. Emmons*, 47 Mo. 304, 6 Gray's Cas. 458; *Dow v. Whitney*, 147 Mass. 1. 6 Gray's Cas. 434; *Meek v. Skeen*, 8 C. C. A. 641, 60 Fed. 322; *Carden v. Lane*, 48 Ark. 216, 3 Am. St. Rep. 228; *Gorman v. Wood*, 68 Ga. 524; *Gower v. Doheney*, 33 Iowa, 36; *Lee v. Birmingham*, 30 Kan. 312; *McFadden v. Worthington*, 45 Ill. 362; *Boynton v. Winslow*, 37 Pa. St. 315; *Walker v. McKnight*, 15 B. Mon. (Ky.) 467; *Paine's Lessee v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585.

<sup>79</sup> 2 *Pomeroy*, Eq. Jur. § 724.

<sup>80</sup> See post, § 507.

<sup>81</sup> *Stevenson v. Texas & P. Ry. Co.*, 105 U. S. 703; *Motley v. Jones*, 98 Ala. 443; *Sharp v. Shea*, 32 N. J. Eq. 65; *Blum v. Schwartz* (Tex.) 20 S. W. 54; *Butler v. Maury*, 10 Humph. (Tenn.) 420; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334.

<sup>82</sup> See post, § 507.

<sup>83</sup> *Moyer v. Hinman*, 13 N. Y. 180; *Churchill v. Morse*, 23 Iowa, 229,

§ 487. *Lis pendens*.

The doctrine of *lis pendens*, by which one purchasing land from a party to a pending litigation concerning such land takes subject to the results of such litigation, is based, not on the theory that such purchaser has notice of the adverse claim, but rather on the principle that, pending the litigation, a party thereto cannot transfer his rights in the land to others, so as to prejudice another party to the litigation, since otherwise the decision might be utterly ineffectual.<sup>84</sup> The courts, however, usually refer to the doctrine as constituting a branch of the law of notice, a pending litigation being said to be notice to purchasers from parties thereto, and this is, in most all cases, the result of the doctrine. Consequently it is not improper to discuss the doctrine in connection with the law of notice.

The doctrine of *lis pendens* is sometimes spoken of as being peculiarly applicable to equitable proceedings, on the ground that, in the case of a legal action, a purchaser pending the litigation can take only the title of his vendor, irrespective of notice; but this principle in regard to legal actions seems to involve but another statement of the doctrine of *lis pendens*, and the doctrine is regularly applied in the case of proceedings concerning land at law, as well as in equity.<sup>85</sup>

92 Am. Dec. 422; Rhodes v. Outcalt, 48 Mo. 367; Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 381.

<sup>84</sup> 2 Pomeroy, Eq. Jur. § 632; Bellamy v. Sabine, 1 De Gex & J. 566; Newman v. Chapman, 2 Rand. (Va.) 93, 6 Gray's Cas. 464; Dovey's Appeal, 97 Pa. St. 153; Arrington v. Arrington, 114 N. C. 151; Watson v. Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459; Lamont v. Cheshire, 65 N. Y. 30; Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233; Cheever v. Minton, 12 Colo. 557, 13 Am. St. Rep. 258.

<sup>85</sup> See 2 Pomeroy, Eq. Jur. § 633; Metcalfe v. Pulvertoft, 2 Ves. & B. 200; McIlwrath v. Hollander, 73 Mo. 105, 39 Am. Rep. 484; Lamont v. Cheshire, 65 N. Y. 30; Smith v. Hodsdon, 78 Me. 180; Rollins v. Henry, 78 N. C. 342; Cheever v. Minton, 12 Colo. 557, 13 Am. St. Rep. 258; Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233; Houston v. (1098)

Applications of the doctrine accordingly occur in connection with actions of ejectment,<sup>86</sup> as well as in connection with equitable proceedings, such as suits to foreclose a mortgage or enforce any other lien,<sup>87</sup> to establish a trust in land,<sup>88</sup> or to set aside a conveyance.<sup>89</sup>

A purchaser is affected with notice only if the land is described with reasonable certainty in the pleadings in the litigation.<sup>90</sup> A purchaser from a person who is not a party to pending litigation concerning the land is not affected with notice thereof.<sup>91</sup>

By statute in many of the states the original doctrine of *lis pendens* has been modified by statutory provisions requiring a notice of *lis pendens* to be registered or recorded in some particular mode, in order that a purchaser for value

Timmerman, 17 Or. 499, 11 Am. St. Rep. 848; Tilton v. Cofield, 93 U. S. 163.

<sup>86</sup> Walden v. Bodley's Heirs, 9 How. (U. S.) 34; Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166; Smith v. Hodsdon, 78 Me. 180; Snively v. Hitechew, 59 Pa. St. 49; Rollins v. Henry, 78 N. C. 342; Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190.

<sup>87</sup> Dodd v. Lee, 57 Mo. App. 167; Owen v. Kilpatrick, 96 Ala. 421; Burleson v. McDermott, 57 Ark. 229; Norris v. Ile, 152 Ill. 190, 43 Am. St. Rep. 233; Rosenheim v. Hartsock, 90 Mo. 357; O'Brien v. Putney, 55 Iowa, 292.

<sup>88</sup> Walker v. Elledge, 65 Ala. 51; Pratt v. Hoag, 5 Duer (N. Y.) 631.

<sup>89</sup> Mellen v. Moline Malleable Iron Works, 131 U. S. 352; Jackson v. Andrews, 7 Wend. (N. Y.) 152, 22 Am. Dec. 574, 6 Gray's Gas. 473; Evans v. Welch, 63 Ala. 250; Leuders v. Thomas, 35 Fla. 518, 48 Am. St. Rep. 255; Watson v. Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459.

<sup>90</sup> Miller v. Sherry, 2 Wall. (U. S.) 237; Low v. Pratt, 53 Ill. 438; Todd v. Outlaw, 79 N. C. 235; Lewis v. Mew, 1 Strob. Eq. (S. C.) 180; Griffith v. Griffith, 9 Paige (N. Y.) 317.

<sup>91</sup> Miller v. Sherry, 2 Wall. (U. S.) 237; Green v. Rick, 121 Pa. St. 130, 6 Am. St. Rep. 760; Allen v. Morris, 34 N. J. Law, 159; Herrington v. Herrington, 27 Mo. 560; Parks v. Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656; Scarlett v. Gorham, 28 Ill. 319; Parsons v. Hoyt, 24 Iowa, 154; Travis v. Topeka Supply Co., 42 Kan. 625.

and without actual notice may be charged with notice of the litigation.<sup>92</sup>

There is a conflict in the decisions as to whether a suit to enforce a conveyance or incumbrance, such as a mortgage which has not been recorded, is sufficient to make a purchaser pending the litigation a purchaser with notice, so as to render the unrecorded instrument effective as against him.<sup>93</sup>

<sup>92</sup> 2 Pomeroy, Eq. Jur. § 640. See *Smith v. Gale*, 144 U. S. 509; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 73 Am. Dec. 575; *Jorgenson v. Minneapolis & St. L. Ry. Co.*, 25 Minn. 206; *Sheridan v. Andrews*, 49 N. Y. 478; *Todd v. Outlaw*, 79 N. C. 235; *Alterauge v. Christiansen*, 48 Mich. 60.

<sup>93</sup> That it does have such effect, see *Bolling v. Carter*, 9 Ala. 921, 6 Gray's Cas. 477; *Thoms v. Southard*, 2 Dana (Ky.) 475. That it does not, see *Newman v. Chapman*, 2 Rand. (Va.) 93, 14 Am. Dec. 766, 6 Gray's Cas. 464; *Douglass v. McCrackin*, 52 Ga. 596. See, also, *McCutchen v. Miller*, 31 Miss. 65, 85.

(1100)



## CHAPTER XXXII.

### REGISTRATION OF TITLE.

- § 488. The purpose of the legislation.
- 489. The method of registration.
- 490. Transfers after registration.
- 491. Equitable interests.
- 492. Liens.
- 493. Transfer of decedent's land.

In some states there exist statutory provisions for the registration of title to land, the effect of which is to make a certificate of title, issued by an official named in the statute, conclusive as to the character of the title of the person to whom it is issued, and as to the rights of other persons in connection with such title.

#### § 488. The purpose of the legislation.

The system of registration of titles, frequently called the "Torrens System,"<sup>1</sup> has for its purpose the establishment of a system by which the title to a particular piece of land will be always ascertainable by reference to a certificate issued by a government official, made by law conclusive in this regard. Such a certificate is first issued after a judicial proceeding in the nature of a suit to quiet title, and all subsequent transfers or transactions affecting the title are either noted on this certificate, or on a new certificate substituted therefor. The advantages claimed for this system over that

<sup>1</sup> After Sir Robert Torrens, of South Australia, who first introduced it into use among English speaking people. A similar system had been in vogue in some parts of the present German empire for many years.

now in vogue in this country, by which a purchaser is dependent chiefly on the record of conveyances for knowledge of the state of his vendor's title, are many. Chief among them are the saving to the community of the cost of a new examination of the title in connection with each transfer or other transaction affecting the land, the removal of all uncertainties as to the title, which can be accomplished only partially by the present system of examining the records, and the greater speed with which transfers can be effected, after the title has once been made the subject of judicial proceedings for its establishment. The details of the legislation providing for the introduction of this system differ greatly in different countries, and, so far as introduced in this country, in different states, and a mere outline of the methods of procedure thereunder can here be given.<sup>2</sup>

#### § 489. The method of registration.

In order that land may be registered under the statute, and the initial certificate of title obtained, the following mode of procedure is usually prescribed: The person or persons claiming the ownership of the land in fee simple file an application, addressed to the court having jurisdiction under the statute, describing the land, setting forth any estates, interests, or liens outstanding in other persons, so far as known to the petitioner, the name of the occupant, and the names of owners of adjoining land. Upon the filing of the application it is referred to one or more official examiners of title, who, after making a proper examination, report to the court. Any persons who appear to be interested in the land are made parties, and the statute provides for the sending of no-

<sup>2</sup> There is a great deal of literature on the subject, to a great extent in the form of articles in legal periodicals. Lists of such articles may be found in Morris, *Land Registration* (English), and *Land Title Registration*, by Theodore Sheldon, Esq. (American).

tices to such persons, and also for the publication of a notice in a newspaper for a prescribed period. If the examiner approves the title, and no adverse claims are presented, or if those presented do not appear meritorious, the court confirms the applicant's title, and directs the person having charge of the registration office, known usually as the registrar, to issue to the applicant a certificate of title. This certificate states that the applicant has a fee-simple title (or otherwise, as the case may be), and also there are noted on the certificate any outstanding interests, trusts, or incumbrances in other persons which are recognized by the decree of the court. This certificate is made out in duplicate; one copy being issued to the applicant and one copy being retained in the registration office, where it is inserted in a book called the "register" or "registration book."

No person other than the owner in fee simple can, under the acts adopted in this country, obtain the registration of the title, but the existence of lesser estates in other persons does not affect such owner's right to registration, the rights of the owners of lesser estates being protected by statements upon the certificate issued to the owner in fee simple.

The proceeding by which the title is registered is, by the terms of the statute, absolutely conclusive upon all persons, either immediately upon the rendition of the decree, or within a short period thereafter. The proceeding is thus in effect one to quiet title. The constitutionality of such legislation, in so far as it makes the decree binding upon persons interested in the land, who receive notice of the proceeding merely by publication, has been vigorously questioned, on the ground that it deprives such persons of property without due process of law; but it has been upheld in at least three states.<sup>3</sup>

<sup>3</sup> *Tyler v. Judges of Court of Registration*, 175 Mass. 71; *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175; *State v. Westfall* (Minn.) 89 N. W. 175. See note to latter case in 54 Cent. Law J. 293.

The United States supreme court has refused to assume jurisdiction to determine the question until a case is presented by one who has actually been deprived of property by means of such legislation.<sup>4</sup>

The certificate issued upon the registration of the title is conclusive that no outstanding interests and incumbrances exist in other persons, with certain exceptions, specified in the statute, these exceptions ordinarily including liens for taxes, leases for terms of but a few years, highways, and easements, or particular classes of easements, and, as to all such excepted interests, any purchaser of the land must satisfy himself otherwise than by reference to the certificate of title.

Rights of ownership in the land less than fee simple, as well as rights in the land existing in others, such as easements and profits *a prendre*, are not usually the subject of a separate certificate, but they are protected by memoranda upon the certificate of the fee-simple owner.

#### § 490. Transfers after registration.

After the title to particular land has been registered, all subsequent transactions affecting such title must be by means of the machinery furnished by the act. If the owner of the fee-simple title, as registered, desires to make a transfer thereof, he makes the usual conveyance, and hands it, together with his certificate of title, to the intending purchaser, who delivers them to the registrar, who then cancels the former certificate, and makes out a new one in favor of the purchaser. The latter is protected, as against any adverse claims unknown to him, by his ability to inspect the original certificate before paying over the price, and on this he can absolutely rely, except with reference to the classes of rights excepted in the statute. The delivery of the conveyance to

<sup>4</sup> Tyler v. Judges of Court of Registration, 179 U. S. 405.

the grantee therein is not regarded as effecting a transfer of title, but the transfer takes place only upon the issuance of the new certificate. In case the fee-simple owner desires to transfer only a part of the land, his former certificate is canceled, and a new certificate is issued to him for the part retained, and another is issued to the purchaser for his part.

### § 491. Equitable interests.

The registration is of the legal title only, and, in case an equitable interest has been created in another by a declaration of trust or otherwise, a memorandum to that effect is made upon the certificate, without stating the terms of the instrument creating the same, but referring to the place of record of such instrument. The statute usually provides that no instrument undertaking to deal with land held in trust shall be registered until it has been approved by a court, or, in one state at least, by official examiners of title, as being in accordance with the terms of the trust, it being provided that such approval shall be conclusive as to the validity of the transfer.<sup>5</sup>

### § 492. Liens.

Though the subject of liens, including mortgages, is treated in a subsequent part of this work, it seems desirable to here consider the effect of the registration of the title to land upon such liens as may be created thereon.

<sup>5</sup> The Illinois act (Laws 1897, p. 156, § 69), making the approval of such transfer by two examiners conclusive as to its validity, has been criticised as conferring judicial powers upon ministerial officers. It has, however, been sustained by the supreme court. *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175. In Massachusetts this difficulty is avoided by the establishment of a court of land registration, which renders a decree construing the trust in such a case, and performs any other acts of a judicial nature which may be called for in the administration of the law.



All existing liens, equitable or statutory, except those excepted in the statute, are noted upon the certificate of title when issued upon the registration of the land, and those subsequently created on the land are also required to be noted on the certificate, generally upon the filing with the registrar of a copy of the proceedings or instrument upon which the lien is based.

In the case of a mortgage on the land, made subsequent to the registration of the title, the statute sometimes provides for the issue of a duplicate certificate of title to the mortgagee, a memorandum of such issue being noted on the original certificate in the registration book, while sometimes the mortgage merely is given to the mortgagee, a duplicate being held by the registrar, and the transaction being, as in the other case, noted in the registration book. Upon an assignment or discharge of the mortgage, these facts are noted upon the certificate in the registration book.

### § 493. Transfer of decedent's land.

The acts providing for the registration of title differ in their provisions for the transfer upon the register of lands belonging to a decedent. By some statutes it is provided that the title to all registered land shall, on the death of the owner, pass to the executor or administrator, or to a trustee to be selected, and that he, under an order of court, shall transfer the title upon the register to the heirs or devisees as named in the order, or to the purchaser, in case the land is sold for purposes of administration. Other statutes provide that the heirs or devisees shall make application for the entry of a new certificate in their favor, and, after notice to all persons in interest by publication and otherwise, and after due hearing, such a certificate is issued, subject, however, to all claims against deceased until final settlement of the estate, and a transfer of the land to another.

## CHAPTER XXXIII.

### RESTRICTIONS UPON THE FREEDOM OF TRANSFER.

- § 494. General considerations.
- 495. Conveyances in fraud of creditors.
- 496. Conveyances in fraud of subsequent purchasers.
- 497. Conveyances in violation of the bankrupt act.
- 498. Transfers by disseisees.
- 499. The homestead exemption.
- 500. Restrictions in creation of estate.

The right of one having an estate or interest in land to transfer it to another is subject to restrictions as follows:

The transfer must not be in fraud of creditors, as being intended to deprive them of the means of realizing their claims from the debtor's property.

The transfer must not be in fraud of a subsequent purchaser, as being intended as a device for rendering the sale to such purchaser nugatory.

Under the United States bankruptcy act, a transfer by one within a certain time before he is adjudged a bankrupt, with the purpose of giving a preference to a particular creditor, is voidable, as is a general assignment of all his property for the benefit of creditors.

In some states, one cannot transfer land which is in the adverse possession of another.

In many states, the interest of a debtor in the "homestead" occupied by his family is, to a certain extent, measured either by the quantity or value of the land, exempt from liability to involuntary transfer under execution, or otherwise, in satisfaction of his debts, other than those of particular excepted classes. In some states the statute extends the benefit of the exemption to persons having no family.

One cannot, in creating a legal estate in fee, restrict the rights of the tenant as regards voluntary alienation, or the rights of the latter's creditors to proceed against the land; nor can one so do in creating a legal life estate or an estate for years, except by a provision that the estate shall terminate upon such voluntary or involuntary alienation. Furthermore, one cannot, in assigning an estate for years, impose such a restriction upon his assignee. In connection with equitable, as distinct from legal, estates for life, in many states, and apparently, in a few, in connection with equitable estates in fee simple, a restriction may be imposed, in the creation of the estate, upon the rights of the beneficiary to transfer his interest, and upon the rights of his creditors to collect their claims therefrom, such express restrictions creating what are frequently termed "spendthrift trusts."

#### § 494. General considerations.

As a general rule, the owner of any particular estate in land has full power to make any disposition thereof, transferring either all his rights in the land or a part only, and creating at his pleasure, in favor of different persons, such estates as are recognized by the law. There are, however, certain restrictions imposed by law upon the right of transfer. One class of such restrictions—those growing out of the legal incapacity of certain classes of persons to transfer any interests in land, or, in some cases, to acquire them—will be considered in the next chapter. Of the other restrictions upon the right of the owner of land to transfer his land when and as he chooses, those imposed by the rule against perpetuities,<sup>1</sup> by the prohibition of invalid conditions,<sup>2</sup> by the law as to charitable trusts,<sup>3</sup> and for the pur-

<sup>1</sup> Ante, §§ 152-160.

<sup>2</sup> Ante, § 70.

<sup>3</sup> Ante, § 102.

pose of protecting marital rights<sup>4</sup> have been before discussed.

There remain to be considered the restrictions arising from the prohibition of conveyances in fraud of creditors,<sup>5</sup> the prohibition of conveyances in fraud of subsequent purchasers,<sup>6</sup> those imposed by the bankrupt act,<sup>7</sup> those existing, in a few states, as a result of a statutory prohibition of the conveyance of land in the adverse possession of another.<sup>8</sup> The restrictions previously enumerated are imposed solely upon the voluntary transfer of interests in land by the person entitled thereto. There also exist, in many of the states, statutes of great importance, exempting from forced sale in behalf of a creditor the "homestead" or residence of the debtor, and these statutes also usually prohibit a conveyance of such homestead without the assent of the owner's wife, they thus effecting a restriction upon both the voluntary and involuntary transfer of his title.<sup>9</sup> Frequently, although the law imposes no restriction upon the right of the owner of land to dispose thereof, or of his creditors to enforce payment therefrom, the instrument by which he is given title to the land undertakes to restrict his rights, or those of his creditors, in this regard.<sup>10</sup>

#### § 495. Conveyances in fraud of creditors.

By St. 13 Eliz. c. 5,<sup>11</sup> it was provided "that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels,

<sup>4</sup> Ante, §§ 189, 209.

<sup>5</sup> Post, § 495.

<sup>6</sup> Post, § 496.

<sup>7</sup> Post, § 497.

<sup>8</sup> Post, § 498.

<sup>9</sup> Post, § 499.

<sup>10</sup> Post, § 500.

<sup>11</sup> A. D. 1570.

\* \* \* and all and every bond, suit, judgment, and execution," made to hinder, delay, or defraud creditors or others "of their just and lawful actions, suits, debts, accounts, damages," etc., should be deemed, as against that person or persons, his heirs and successors, whose actions, suits, etc., are or might be in any wise disturbed, hindered, delayed, or defrauded, utterly void. This statute has been frequently asserted to be merely declaratory of the common law, and probably at the present day, even in the absence of any statute, the rights of creditors would be protected at law or in equity as against such a fraudulent attempt by the debtor to avoid paying his debts.<sup>12</sup> In most of the states, however, there is an express statute essentially similar to the English statute.<sup>13</sup> In at least two states the statute has been adopted as part of the common law of the state.<sup>14</sup>

The statutes directed against fraudulent conveyances do not prohibit the preference by a debtor in failing circumstances of one or more of his creditors, provided the property conveyed for the purpose of effecting such preference does not exceed the *bona fide* amount of the debt or debts, and no benefit is reserved to the grantor.<sup>15</sup> It is only by means of an express prohibition of such preferences, such as is found in the bankrupt act, that they can be regarded as invalid.

The creditors protected by the terms of the statutes above referred to include not only those who are such at the time

<sup>12</sup> 2 Bigelow, Fraud, c. 2.

<sup>13</sup> 1 Stimson's Am. St. Law, § 4591.

<sup>14</sup> Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233; Howe v. Ward, 4 Me. 195.

<sup>15</sup> 2 Bigelow, Fraud, 491; Huntley v. Kingman, 152 U. S. 527; Southern White Lead Co. v. Haas, 73 Iowa, 399; Banfield v. Whipple, 14 Allen (Mass.) 13; Wilt v. Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474; Skipwith's Ex'r v. Cunningham, 8 Leigh (Va.) 271, 31 Am. Dec. 642.



of the conveyance alleged to be fraudulent, but also those persons who may thereafter become creditors. So, in case one makes a conveyance of property with the present intention of entering into a hazardous business, or of creating debts, with the knowledge that the conveyance will probably affect his ability to pay his debts, the conveyance will be void as against the persons with whom such debts were contracted.<sup>16</sup>

If a conveyance is made with the intention of defrauding creditors, the fact that it is based on a valuable consideration will not render it valid as against them.<sup>17</sup>

A voluntary conveyance—that is, one not supported by a valuable consideration—is, in some states, void as against existing creditors, on a conclusive presumption of fraud on the part of the grantor.<sup>18</sup> But in most jurisdictions, though a voluntary conveyance is presumptively fraudulent as against existing creditors, it is upheld if it can be shown that, at the time of making it, the grantor retained amply sufficient property to satisfy the claims of his creditors, and that it was owing only to the happening of unforeseen contingencies

<sup>16</sup> *Winchester v. Charter*, 12 Allen (Mass.) 606, 6 Gray's Cas. 295; *Case v. Phelps*, 39 N. Y. 164, 6 Gray's Cas. 299; *Redfield v. Buck*, 35 Conn. 328, 95 Am. Dec. 241; *Snyder v. Free*, 114 Mo. 360; *Monroe v. Smith*, 79 Pa. St. 459; *Churchill v. Wells*, 7 Cold. (Tenn.) 364; *Rudy v. Austin*, 56 Ark. 73, 35 Am. St. Rep. 85; *Moritz v. Hoffman*, 35 Ill. 553; *Mackay v. Douglas*, L. R. 14 Eq. 106, 6 Gray's Cas. 223; *Ex parte Russell*, 19 Ch. Div. 588, 6 Gray's Cas. 235.

<sup>17</sup> *Twyne's Case*, 3 Coke, 80b, 6 Gray's Cas. 196, 1 Smith, Lead. Cas. Eq. 1; *Gragg v. Martin*, 12 Allen (Mass.) 498; *Gable v. Columbus Cigar Co.*, 140 Ind. 563; *Haymaker's Appeal*, 53 Pa. St. 306; *Billings v. Russell*, 101 N. Y. 226; *May*, *Fraud. Conv.* (2d Ed.) 85 et seq.; *Wait*, *Fraud. Conv.* §§ 207, 208.

<sup>18</sup> *Wooten v. Steele*, 109 Ala. 563, 55 Am. St. Rep. 947; *Swartz v. Hazlett*, 8 Cal. 126; *Severs v. Dodson*, 53 N. J. Eq. 633, 51 Am. St. Rep. 641. See *Marmon v. Harwood*, 124 Ill. 104.

that he was unable to pay such claims.<sup>19</sup> In a number of states the statute provides, in accordance with this view, that a conveyance is not necessarily void because voluntary.<sup>20</sup> The fact that a conveyance is voluntary does not render it open to attack by subsequent creditors, unless it was made under circumstances showing actual fraud.<sup>21</sup>

A conveyance, though declared by the statute to be "void" as against creditors, is merely voidable by them, and, as between the parties thereto and their successors in interest, and as against other persons not creditors, it is perfectly valid.<sup>22</sup> A conveyance which is fraudulent as to one or more creditors is, it seems, invalid as to all;<sup>23</sup> and, by some decisions, a conveyance fraudulent as to existing creditors is regarded as voidable at the instance of subsequent creditors,<sup>24</sup> though, in some states, such a view is considered to

<sup>19</sup> *Pratt v. Curtis*, 2 Lowell, 87, Fed. Cas. No. 11,375, 6 Gray's Cas. 304; *Parish v. Murphree*, 13 How. (U. S.) 92; *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 46, 7 Am. St. Rep. 78; *Clark v. Depew*, 25 Pa. St. 509, 64 Am. Dec. 717; *Cole v. Tyler*, 65 N. Y. 78; *Goodman v. Wineland*, 61 Md. 449; *Rudy v. Austin*, 56 Ark. 73, 35 Am. St. Rep. 85, and note; *Lowry v. Fisher*, 2 Bush (Ky.) 70, 92 Am. Dec. 475.

<sup>20</sup> 1 *Stimson's Am. St. Law*, § 4598.

<sup>21</sup> See *Todd v. Nelson*, 109 N. Y. 316, 6 Gray's Cas. 307; *Pratt v. Curtis*, 2 Lowell, 87, Fed. Cas. No. 11,375, 6 Gray's Cas. 304; *Winchester v. Charter*, 12 Allen (Mass.) 606, 6 Gray's Cas. 295; *Elyton Land Co. v. Iron City Steam Bottling Works*, 109 Ala. 602; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732, and note; *Kane v. Desmond*, 63 Cal. 464; *Moritz v. Hoffman*, 35 Ill. 553; *Bullitt v. Taylor*, 34 Miss. 708, 69 Am. Dec. 412; *Thompson v. Allen*, 103 Pa. St. 44, 49 Am. Rep. 116.

<sup>22</sup> *Anderson v. Roberts*, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235, 6 Gray's Cas. 369; *Lawton v. Gordon*, 34 Cal. 36, 91 Am. Dec. 670; *Knight v. Glasscock*, 51 Ark. 390; *Stillings v. Turner*, 153 Mass. 534; *Burt v. Timmons*, 29 W. Va. 441, 6 Am. St. Rep. 664; *McElroy v. Hiner*, 133 Ill. 156.

<sup>23</sup> *Barrett v. Nealon*, 119 Pa. St. 171, 4 Am. St. Rep. 628; *Personette v. Cronkhite*, 140 Ind. 586; *Savage v. Knight*, 92 N. C. 493, 53 Am. Rep. 423.

<sup>24</sup> *McLane v. Johnson*, 43 Vt. 48; *Bassett v. McKenna*, 52 Conn. 437; *Pratt v. Curtis*, 2 Lowell, 87, Fed. Cas. No. 11,375, 6 Gray's (1112)

be applicable only\* under particular circumstances, as when there is a secret trust for the grantor, or the pre-existing debts remain unpaid, or the subsequent creditors were, at the time the debts were contracted, entirely without knowledge of the previous conveyance.<sup>25</sup>

— Protection of bona fide purchasers.

Although a conveyance is otherwise voidable as being in fraud of creditors, it will not be so treated in case the grantee was a purchaser for value without notice of the fraud. The Statute of Elizabeth and most of the state statutes contain an exception in favor of such a purchaser;<sup>26</sup> but even in the absence of any statute, the exception has been enforced, in pursuance of the usual equitable policy of protecting *bona fide* purchasers for value.<sup>27</sup>

The protection accorded to a *bona fide* purchaser for value is also extended to one who is, not the grantee in the fraudulent conveyance, but a purchaser from the grantee; and this, although the conveyance could have been avoided as against the original grantee, owing to his knowledge of the fraud, or because he did not pay a valuable consideration.<sup>28</sup>

Cas. 304; Walsh v. Byrnes, 39 Minn. 527; Jordan v. Collins, 107 Ala. 572; Day v. Cooley, 118 Mass. 527; Trezevant v. Terrell, 96 Tenn. 528; Lockhard v. Beckley, 10 W. Va. 87; 2 Bigelow, Fraud, 89 et seq.

<sup>25</sup> See Clark v. French, 23 Me. 221, 39 Am. Dec. 618; Wyman v. Brown, 50 Me. 139; Claflin v. Mess, 30 N. J. Eq. 211; Springer v. Bigford, 160 Ill. 495; Simmons v. Ingram, 60 Miss. 886; Monroe v. Smith, 79 Pa. St. 459; Sheppard v. Thomas, 24 Kan. 780; Hagerman v. Buchanan, 45 N. Y. Eq. 292, 14 Am. St. Rep. 732, and note.

<sup>26</sup> 1 Stimson's Am. St. Law, § 4598.

<sup>27</sup> Gridley v. Bingham, 51 Ill. 153; Farlin v. Sook, 30 Kan. 401, 46 Am. Rep. 100; Leach v. Francis, 41 Vt. 670; Jackson v. Glaze, 3 Okl. 143; Dougherty v. Cooper, 77 Mo. 528; Tiernay v. Claflin, 15 R. I. 220; Shauer v. Alterton, 151 U. S. 607.

<sup>28</sup> Anderson v. Roberts, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235, 6 Gray's Cas. 369; George v. Kimball, 24 Pick. (Mass.) 234; Thames v. Rembert's Adm'r, 63 Ala. 561; Williamson v. Russell, 39 Conn.

## § 496. Conveyances in fraud of subsequent purchasers.

St. 27 Eliz. c. 4, made perpetual by St. 39 Eliz. c. 18, provided in effect that all alienations of land, made with intent to defraud and deceive subsequent purchasers for valuable consideration, should, as against such persons and persons claiming under them, be void, unless the alienation be made for good consideration and *bona fide*. The expression "good" consideration, as used in the statute, has always been construed as meaning "valuable" consideration.<sup>29</sup>

This statute is frequently stated to be declaratory of the common law.<sup>30</sup> This is questionable, however.<sup>31</sup> In many states in this country there is an express statutory provision substantially equivalent to the English statute,<sup>32</sup> while occasionally such statute has been regarded as in force without any express provision upon the subject.<sup>33</sup>

In England the statute was construed as invalidating any conveyance not made on a valuable consideration, as against one to whom the grantor subsequently conveyed the land on a valuable consideration, even though the subsequent alienee had notice of the previous conveyance, the execution of the subsequent conveyance being regarded as evidence that the

406; *Scott v. Purcell*, 7 Blackf. (Ind.) 66, 39 Am. Dec. 453; *Young v. Lathrop*, 67 N. C. 63, 12 Am. Rep. 663; *Sawtelle v. Weymouth*, 14 Wash. 21.

<sup>29</sup> *Twyne's Case*, 3 Coke, 80b, 6 Gray's Cas. 196, 1 Smith, Lead. Cas. Eq. 1; *Dolphin v. Aylward*, L. R. 4 H. L. 486; 2 Bigelow, Fraud, 532; May, Fraud. Conv. (2d Ed.) 245.

<sup>30</sup> *Cadogan v. Kennett*, Cowp. 434; *Hamilton v. Russel*, 1 Cranch (U. S.) 309; *Kimball v. Hutchins*, 3 Conn. 450; *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 318; *Howe v. Waysman*, 12 Mo. 169, 49 Am. Dec. 126.

<sup>31</sup> 1 Story, Eq. Jur. § 352; 2 Bigelow, Fraud, 25.

<sup>32</sup> 1 Stimson's Am. St. Law, § 4592. See 2 Bigelow, Fraud, 517 et seq.

<sup>33</sup> *Beal v. Warren*, 2 Gray (Mass.) 447, 6 Gray's Cas. 321; *Lancaster v. Dolan*, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; *City of Baltimore v. Williams*, 6 Md. 235; *Gardner v. Cole*, 21 Iowa, 205.



first conveyance was fraudulent. The effect of this construction was that a conveyance of land not based on a valuable consideration could always be revoked by the grantor by means of a subsequent conveyance by him for value, unless the first grantee had conveyed the land to a purchaser for value.<sup>34</sup> This construction placed upon the statute was finally removed by a late statute,<sup>35</sup> providing that no voluntary conveyance of land, if *bona fide* and free from fraudulent intent, should be defeated by a subsequent purchase for value. In this country the construction placed upon the act by the English courts has not been adopted, and consequently the influence of the statute has been much less felt. So it is usually held that, if the subsequent purchaser has notice of a previous voluntary conveyance, he cannot claim to have been defrauded thereby, provided there was no actual fraud in the making of the first conveyance.<sup>36</sup> In many states the statute specifically provides that the prior conveyance shall not be void as against a subsequent purchaser with actual or legal notice.<sup>37</sup> Moreover, the notice, to thus preclude the subsequent purchaser from claiming the protection of the statute, need not, by the weight of authority, be actual, constructive notice from the recording of the first convey-

<sup>34</sup> Doe d. Otley v. Manning, 9 East, 59; Doe d. Newman v. Rusham, 17 Q. B. 723, 6 Gray's Cas. 314; Dolphin v. Aylward, L. R. 4 H. L. 486. See May, Fraud. Conv. (2d Ed.) 189 et seq.; Mellick v. Mellick, 47 N. J. Eq. 86. But the heir or devisee of the grantor could not revoke the voluntary conveyance by making a conveyance for value. Doe d. Newman v. Rusham, 17 Q. B. 723, 6 Gray's Cas. 314; Lewis v. Rees, 3 Kay & J. 132.

<sup>35</sup> 56 & 57 Vict. c. 21 (A. D. 1893).

<sup>36</sup> Verplank v. Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348; Lancaster v. Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; Foster v. Walton, 5 Watts (Pa.) 378; Chaffin v. Kimball's Heirs, 23 Ill. 36; City of Baltimore v. Williams, 6 Md. 235; Gilliland v. Fenn, 90 Ala. 230; Anderson v. Etter, 102 Ind. 115; Laird v. Scott, 5 Heisk. (Tenn.) 314; Gardner v. Cole, 21 Iowa, 212.

<sup>37</sup> 1 Stimson's Am. St. Law, § 4592.



ance being sufficient.<sup>38</sup> Apart from the question of the effect of notice of the previous conveyance, the making of the second conveyance is not usually regarded as necessarily showing a fraudulent intent in making the first conveyance, so as to bring it within the terms of the statute,<sup>39</sup> though it may cast upon the grantee in the first conveyance the burden of showing the absence of such an intent.<sup>40</sup> The general result of the decisions in this country, accordingly, is that, while a conveyance intended to be in fraud of a subsequent purchaser is invalid as against him, it is not so, even though voluntary, if not actually fraudulent, and he has notice of its existence.

Even though the prior conveyance be invalid so far as concerns the grantee therein, it cannot be set aside as against a purchaser from him for value without notice of the fraud, nor, when the fraud is based, as formerly in England, on the voluntary character of the conveyance, although he knows of its voluntary character.<sup>41</sup>

The Statute of 27 Eliz. c. 4, also contained a provision that a conveyance containing a power of revocation in the grantor should be invalid as against a subsequent convey-

<sup>38</sup> *Gardner v. Cole*, 21 Iowa, 216; *City of Baltimore v. Williams*, 6 Md. 235; *Lancaster v. Dolan*, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; *Laird v. Scott*, 5 Heisk. (Tenn.) 314. Contra, *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 318. And see *Sterry v. Arden*, 1 Johns. Ch. (N. Y.) 261; *Mellick v. Mellick*, 47 N. J. Eq. 86.

<sup>39</sup> *Beal v. Warren*, 2 Gray (Mass.) 447, 6 Gray's Cas. 321; *Cathcart v. Robinson*, 5 Pet. (U. S.) 280; *Jackson v. Town*, 4 Cow. (N. Y.) 603; *City of Baltimore v. Williams*, 6 Md. 235; *Shaw v. Tracy*, 83 Mo. 224; 4 Kent's Comm. 463, note.

<sup>40</sup> *City of Baltimore v. Williams*, 6 Md. 235; *Gardner v. Cole*, 21 Iowa, 212; *Gilliland v. Fenn*, 90 Ala. 230; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; 1 Story, Eq. Jur. § 427; 2 Pomeroy, Eq. Jur. § 974.

<sup>41</sup> *Prodgers v. Langham*, 1 Sid. 133, 6 Gray's Cas. 328; *Doe d. Newman v. Rusham*, 17 Q. B. 723, 6 Gray's Cas. 314; *Gilliland v. Fenn*, 90 Ala. 230; *Fletcher v. Peck*, 6 Cranch (U. S.) 133; *Reynolds v. Vilas*, 8 Wis. 471, 76 Am. Dec. 238.

ance by the same grantor to a purchaser for a valuable or good consideration. This provision, or its substantial equivalent, has been adopted in many states;<sup>42</sup> but occasion for the application of such statutes has, in England, but seldom arisen, and, in this country, practically never.

§ 497. Conveyances in violation of the bankrupt act.

The present bankrupt act<sup>43</sup> provides that, if one adjudged a bankrupt shall, within four months before the filing of the petition to have him so adjudged, or after the filing of the petition, and before the adjudication, have given a preference to any creditor, such preference shall be voidable by the trustee, provided the person receiving the preference, or to be benefited thereby, or his agent, shall have had reasonable cause to believe that it was intended thereby to give a preference. It is further provided that one shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any others of such creditors of the same class. If, however, property transferred to a creditor by way of preference is by him transferred to a *bona fide* purchaser for value, the latter is not, it would seem, affected by the illegality of the original transfer.<sup>44</sup> The statute also gives the trustee the right to take proceedings to set aside any transfer in fraud of creditors, and vests in him the title to property so transferred.<sup>45</sup> Under the act, more-

<sup>42</sup> 1 Stimson's Am. St. Law, § 4593.

<sup>43</sup> Act July 1, 1898, § 60. See Collier, Bankr. (3d Ed.) 338 et seq.

<sup>44</sup> Rison v. Knapp, 1 Dill. 187, Fed. Cas. No. 11,861; In re Mullen (D. C.) 101 Fed. 413.

<sup>45</sup> Bankruptcy Act, §§ 67, 70; Loveland, Bankr. 299.

over, any general assignment for the benefit of creditors, although free from fraudulent intent, and containing no preferences, is an act authorizing an adjudication of bankruptcy, whereupon the assignment becomes void.<sup>46</sup>

**§ 498. Transfers by disseisees.**

By St. 32 Hen. VIII. c. 9,<sup>47</sup> it was declared to be unlawful to buy or sell any pretended right or title to any lands or hereditaments unless the vendors or their ancestors, or the persons through whom the claim is derived, have been in possession of the property, or of the reversion or remainder thereof, or taken the rents or profits thereof, within a year before the sale, but the purchase of a pretended title, by a person in lawful possession of the rents and profits, was declared to be allowable. It is sometimes said that this statute is merely declaratory of the common law, but since, at common law, and before the Statute of Uses, the transfer of freehold interests in land necessarily involved a transfer of the seisin, there was, it would seem, but little room for the application of a statute forbidding the transfer of land by one who was disseised,—that is, the transfer of a right of entry merely.<sup>48</sup>

In a few states in this country the English statute, or the principle involved therein, was adopted as a part of the common law.<sup>49</sup> In other states there are specific statutory provisions invalidating transfers of land in the adverse pos-

<sup>46</sup> Bankruptcy Act, § 3; Collier, Bankr. 42; West Co. v. Lea, 174 U. S. 594; In re Meyer (C. C. A.) 98 Fed. 976.

<sup>47</sup> The "Pretended Title Act" (A. D. 1540).

<sup>48</sup> See Rawle, Covenants for Title, § 47. Article in 2 Law Quart. Rev. 481, by Prof. Maitland.

<sup>49</sup> Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52; Patterson v. Nixon, 79 Ind. 251; Tabb v. Baird, 3 Call (Va.) 481; Barry v. Adams, 3 Allen (Mass.) 493; 4 Kent's Comm. 448.

session of another person.<sup>50</sup> In a majority of the states, however, at the present time, no restriction upon the right of transfer arising from the fact that the land is in the adverse possession of a third person is recognized,<sup>51</sup> and that such is the law is quite frequently declared by statute.<sup>52</sup>

The adverse possession in a third person which invalidates the conveyance need not, as a rule, be under color of title,<sup>53</sup> though in two states the statute is otherwise construed.<sup>54</sup>

The statute has been held not to apply to a transfer made in the performance of an executory contract valid when made,<sup>55</sup> to a transfer made to correct a mistake,<sup>56</sup> to a

<sup>50</sup> 1 Stimson's Am. St. Law, § 1401.

<sup>51</sup> *Roberts v. Cooper*, 20 How. (U. S.) 467; *Matthews v. Hevner*, 2 App. D. C. 349; *Doe d. Cain v. Roe*, 23 Ga. 82; *Lytle v. State*, 17 Ark. 608; *Mathewson v. Fitch*, 22 Cal. 86; *Bayard v. McLane*, 3 Har. (Del.) 139; *Farrar v. Fessenden*, 39 N. H. 268; *Sims v. De Graffenreid*, 4 McCord (S. C.) 253; *Stoever v. Whitman's Lessee*, 6 Binn. (Pa.) 416.

<sup>52</sup> 1 Stimson's Am. St. Law, § 1401; *Trustees of Putnam Free School v. Fisher*, 34 Me. 172; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430; *Cassedy v. Jackson*, 45 Miss. 397; *Carrington v. Goddin*, 13 Grat. (Va.) 587; *Stewart v. McSweeney*, 14 Wis. 468; *Shortall v. Hinckley*, 31 Ill. 219.

In England, the statute was regarded as invalidating a sale by one who had not been in possession for a year. *Doe d. Williams v. Evans*, 1 C. B. 717. But 8 & 9 Vict. c. 106, making rights of entry alienable, changed the law in this respect. *Kennedy v. Lyell*, 15 Q. B. Div. 491; *Jenkins v. Jones*, 9 Q. B. Div. 128.

<sup>53</sup> *Sharp v. Robertson's Ex'rs*, 76 Ala. 343; *Dubois v. Marshall*, 3 Dana (Ky.) 336; *Barry v. Adams*, 3 Allen (Mass.) 493; *German Mut. Ins. Co. of Indianapolis v. Grim*, 32 Ind. 249, 2 Am. Rep. 341.

<sup>54</sup> See *Crary v. Goodman*, 22 N. Y. 170; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Stoddard v. Whiting*, 46 N. Y. 627; *Kreuger v. Schultz*, 6 N. D. 310.

<sup>55</sup> *Greer v. Wintersmith*, 85 Ky. 516; *Simon v. Gouge*, 12 B. Mon. (Ky.) 156; *Gunn v. Scovil*, 4 Day (Conn.) 234; *Hale v. Darter*, 10 Humph. (Tenn.) 92.

<sup>56</sup> *Hopkins v. Paxton*, 4 Dana (Ky.) 36; *Ross v. Blair*, Meigs (Tenn.) 525; *Augusta Mfg. Co. v. Vertrees*, 4 Lea (Tenn.) 75.

judicial sale,<sup>57</sup> to a transfer by the state,<sup>58</sup> nor to a release made to the person in possession.<sup>59</sup>

A conveyance of land in the adverse possession of another, in violation of the statute, though it does not convey the legal title, so as to enable the grantee to maintain an action against the person in possession, is almost invariably regarded as effective for the purpose of transferring the title as between the parties, and as against everybody except the person in possession and those claiming under him.<sup>60</sup> Consequently, while the grantor can alone sue in ejectment or otherwise for the recovery of the land, a recovery by him inures to the benefit of the grantee,<sup>61</sup> and the grantee may himself, if he so desires, bring ejectment in the name of his grantor.<sup>62</sup>

<sup>57</sup> *Humes v. Bernstein*, 72 Ala. 546; *Little v. Bishop*, 9 B. Mon. (Ky.) 240; *Preston v. Breckinridge*, 86 Ky. 619; *Hoyt v. Thompson*, 5 N. Y. 320; *Coleman v. Manhattan Beach Improvement Co.*, 94 N. Y. 229; *Doe d. Williams v. Bennett*, 26 N. C. 122.

<sup>58</sup> *Ward v. Bartholomew*, 6 Pick. (Mass.) 409; *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552; *Cassedy v. Jackson*, 45 Miss. 407; *Hill v. Dyer*, 3 Me. 441.

<sup>59</sup> *Cameron v. Irwin*, 5 Hill (N. Y.) 272; *Adams v. Buford*, 6 Dana (Ky.) 413.

<sup>60</sup> *Farnum v. Peterson*, 111 Mass. 148; *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321; *Snow v. Inhabitants of Orleans*, 126 Mass. 453; *Den d. Hadley v. Geiger*, 9 N. J. Law, 225; *Hamilton v. Wright*, 37 N. Y. 502; *Van Hoesen v. Benham*, 15 Wend. (N. Y.) 164; *Park v. Pratt*, 38 Vt. 545; *Pearson v. King*, 99 Ala. 125; *Augusta Mfg. Co. v. Vertrees*, 4 Lea (Tenn.) 75; *Crowley v. Vaughan*, 11 Bush (Ky.) 517; *Wilson v. Nance*, 11 Humph. (Tenn.) 189; *Coogler v. Rogers*, 25 Fla. 853; *Wentworth v. Abbetts*, 78 Wis. 63; *Van Hoesen v. Benham*, 15 Wend. (N. Y.) 164.

<sup>61</sup> *Wilson v. Nance*, 11 Humph. (Tenn.) 189; *Hamilton v. Wright*, 37 N. Y. 502; *Chamberlain v. Taylor*, 92 N. Y. 348.

<sup>62</sup> *Farnum v. Peterson*, 111 Mass. 148; *Cleverly v. Whitney*, 7 Pick. (Mass.) 36; *Coogler v. Rogers*, 25 Fla. 853; *Thompson v. Richards*, 19 Ga. 594; *Justice v. Eddings*, 75 N. C. 581; *Park v. Pratt*, 38 Vt. 545; *Key v. Snow*, 90 Tenn. 664. *Contra*, *Crowley v. Vaughan*, 11 Bush (Ky.) 517.



## § 499. The homestead exemption.

In most of the states there are constitutional or statutory provisions exempting from execution or other forced sale for debts, to a certain extent, the "homestead" or residence of the debtor. While these provisions have usually been dictated, in the various states, by the same policy,—that of protecting the family home as against the demands of creditors,—they are exceedingly diverse in character, and even substantially similar provisions have received different constructions in different courts. A brief summary only of the more important features of this legislation, as construed by the courts, can here be given.

The courts have sometimes spoken of the homestead right as an "estate" in land.<sup>63</sup> While the widow's homestead, as before explained, frequently has the characteristics of an estate,<sup>64</sup> it is difficult to understand how the right of an owner of particular land to hold such land exempt from liability for debts can be in any sense an "estate"; and even in states where the statute expressly declares that it is an "estate,"<sup>65</sup> a new meaning must, it would seem, be given to the latter term, in order that the provision may have any real significance.<sup>66</sup> That the homestead right is not an estate has been quite frequently asserted judicially.<sup>67</sup>

<sup>63</sup> *Dorrington v. Myers*, 11 Neb. 389; *Gilbert v. Cowan*, 3 Lea (Tenn.) 203; *Poe v. Hardie*, 65 N. C. 447; *Hargadene v. Whitfield*, 71 Tex. 482.

<sup>64</sup> *Ante*, § 215.

<sup>65</sup> As in Illinois and Massachusetts. See *Browning v. Harris*, 99 Ill. 460; *Abbott v. Abbott*, 97 Mass. 136; *Pratt v. Pratt*, 161 Mass. 278.

<sup>66</sup> The right of homestead exemption is but a partial restoration of the common law of exemption of one's land from liability for debts. The estate of the owner, whether a fee simple, for life, or for years, is not changed by the fact that he marries or takes indigent relatives to live with him, or otherwise acquires a right to the exemption, or by the fact that he loses it by abandonment or

— Persons entitled to the right.

The policy of the homestead statutes is usually to protect the family home, rather than individuals,<sup>68</sup> and consequently the statute ordinarily in terms gives the exemption only to the "head of a family," or to a "householder," or "house-keeper" having a family.<sup>69</sup> Whether one is the head of a family is usually determined by the consideration whether he is under a legal or moral obligation to support a person or persons living with him who are dependent on him for support.<sup>70</sup> The family need not consist of more than two

otherwise. See the discussion in *Waples, Homestead*, c. 9. And see, particularly, the dissenting opinion of Clark, J., in *Vanstory v. Thornton*, 112 N. C. 211, for a clear and forcible statement of the character of the homestead right.

<sup>67</sup> *Black v. Curran*, 14 Wall. (U. S.) 463; *Flatt v. Stadler*, 16 Lea (Tenn.) 371; *Little's Guardian v. Woodward*, 14 Bush (Ky.) 585; *Citizens' Nat. Bank v. Green*, 78 N. C. 247; *Jones v. Britton*, 102 N. C. 166; *Yoe v. Hanvey*, 25 S. C. 96; *Burns v. Keas*, 21 Iowa, 257; *Carrigan v. Rowell*, 96 Tenn. 185; *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112.

<sup>68</sup> *Waples, Homestead*, c. 3.

<sup>69</sup> *Waples, Homestead*, c. 3. See *Moyer v. Drummond*, 32 S. C. 165, 17 Am. St. Rep. 850; *Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404; *Linton v. Crosby*, 56 Iowa, 386, 41 Am. Rep. 107; *Barry v. Western Assur. Co.*, 19 Mont. 571, 61 Am. St. Rep. 530; *Calhoun v. Williams*, 32 Grat. (Va.) 18, 34 Am. Rep. 759; *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106.

<sup>70</sup> *Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404; *Moyer v. Drummond*, 32 S. C. 165, 17 Am. St. Rep. 850; *Holloway v. Holloway*, 86 Ga. 576, 22 Am. St. Rep. 484; *Bank of Versailles v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621; *Lane v. Philips*, 69 Tex. 240, 5 Am. St. Rep. 41; *McMurray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662; *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584.

Accordingly, an unmarried woman, supporting the children of a deceased sister, is entitled to the homestead exemption. *Arnold v. Waltz*, 53 Iowa, 706, 36 Am. Rep. 248. And likewise an unmarried man supporting brothers or sisters dependent on and living with him. *Greenwood v. Maddox*, 27 Ark. 649; *Marsh v. Lazenby*, 41 Ga. 153. So, a woman supporting the children or grandchildren of a deceased husband (*Wolfe v. Buckley*, 52 Tex. 641; *Holloway v.* (1122))

persons.<sup>71</sup> But a person living alone is not usually entitled to the benefit of the law,<sup>72</sup> even though he supports others, if these others live apart from him.<sup>73</sup> In a number of states, however, it has been held that one who has been entitled to the exemption as head of a family continues to be so entitled, so long as he remains in possession of the same home, although he ceases to be actually the head of a family, owing to the death or departure of all the other members.<sup>74</sup> The head of the family need not be a man;<sup>75</sup> nor need he or she be married.<sup>76</sup> But a mere contract relation,

Holloway, 86 Ga. 576, 22 Am. St. Rep. 484), and a father for whom adult children living with him did work without wages (*Bank of Versailles v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621), have been held to be entitled to claim the exemption. But one who supports relatives living with him who are independent of his support is not entitled to claim the homestead right. *Harbison v. Vaughan*, 42 Ark. 539; *Ramey v. Allison*, 64 Tex. 697. Nor is one who supports persons living with him who are not related to him. *Bosquett v. Hall*, 90 Ky. 566, 29 Am. St. Rep. 404; *Galligar v. Payne*, 34 La. Ann. 1057; *Hill v. Franklin*, 54 Miss. 632; *Whitehead v. Nickelson*, 48 Tex. 517.

<sup>71</sup> *Kitchell v. Burgwin*, 21 Ill. 40; *Barney v. Leeds*, 51 N. H. 253; *Chamberlain v. Brown*, 33 S. C. 597; *Miller v. Finegan*, 26 Fla. 29.

<sup>72</sup> *Wilson v. Cochran*, 31 Tex. 677, 98 Am. Dec. 553; *Calhoun v. Williams*, 32 Grat. (Va.) 18, 34 Am. Rep. 759; *Rock v. Haas*, 110 Ill. 528.

<sup>73</sup> *Rock v. Haas*, 110 Ill. 528; *Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 165. And see *Pearson v. Miller*, 71 Miss. 379, 42 Am. St. Rep. 470.

<sup>74</sup> *Silloway v. Brown*, 12 Allen (Mass.) 30; *Stanley v. Snyder*, 43 Ark. 429; *Stutts v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575; *Wilkinson v. Merrill*, 87 Va. 513; *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Barney v. Leeds*, 51 N. H. 253.

<sup>75</sup> *Brooks v. Collins*, 11 Bush (Ky.) 622; *Chamberlain v. Brown*, 33 S. C. 597. And see cases referred to ante, note 70.

<sup>76</sup> *Arnold v. Waltz*, 53 Iowa, 706, 36 Am. Rep. 248; *Ellis v. White*, 47 Cal. 73; *Lane v. Philips*, 69 Tex. 240, 5 Am. St. Rep. 41; *Chamberlain v. Brown*, 33 S. C. 597; *Marsh v. Lazenby*, 41 Ga. 154; *Greenwood v. Maddox*, 27 Ark. 649.

as when one has only servants living with him, is not sufficient.<sup>77</sup>

During the husband's life, the wife is, by the construction placed on some of the statutes, excluded from the right to a homestead exemption, even in her own property, she not being the head of a family,<sup>78</sup> while, under other statutes, she is entitled to such homestead in her own property.<sup>79</sup> Occasionally the wife has been held to be entitled to claim a homestead in the husband's land on the husband's failure to do so,<sup>80</sup> or upon the desertion of the wife and family by the husband.<sup>81</sup>

— Land in which the right exists.

Since the purpose of the homestead law is usually to protect the family residence, only such land is ordinarily exempt thereunder as is occupied as such residence.<sup>82</sup> This requirement of occupancy is not regarded as satisfied by a mere indefinite intention to occupy the land as a home in the future.<sup>83</sup> But acts constituting a preparation of the

<sup>77</sup> Calhoun v. McLendon, 42 Ga. 405; Garaty v. Du Bose, 5 Rich. (S. C.) 493; Ellis v. Davis, 90 Ky. 183; Whitehead v. Nickelson, 48 Tex. 517; Calhoun v. Williams, 32 Grat. (Va.) 18, 34 Am. Rep. 759. But one having only a servant living with him was held to be a "housekeeper." Pierce v. Kusic, 56 Vt. 418.

<sup>78</sup> Fuselier v. Buckner, 28 La. Ann. 594; Turner v. Argo, 89 Tenn. 443; Barry v. Western Assur. Co., 19 Mont. 571, 61 Am. St. Rep. 530. See Rosenberg v. Jett (C. C.) 72 Fed. 90.

<sup>79</sup> Crane v. Waggoner, 33 Ind. 83; Partee v. Stewart, 50 Miss. 717; Hill v. Myers, 46 Ohio St. 183; Ehrck v. Ehrck, 106 Iowa, 614; McPhee v. O'Rourke, 10 Colo. 301. See Kenley v. Hudelson, 99 Ill. 493, 39 Am. Rep. 31.

<sup>80</sup> Bowen v. Bowen, 55 Ga. 182; Farley v. Hopkins, 79 Cal. 203.

<sup>81</sup> Hollis v. State, 59 Ark. 211, 43 Am. St. Rep. 28; Moore v. Dunning, 29 Ill. 130.

<sup>82</sup> Waples, Homestead, c. 6.

<sup>83</sup> Williams v. Dorris, 31 Ark. 466; Lee v. Miller, 11 Allen (Mass.) 37; Christy v. Dyer, 14 Iowa, 438, 81 Am. Dec. 493; Evans v. Calman, 92 Mich. 427, 31 Am. St. Rep. 606; Power v. Burd, 18 Mont. 22; Fant (1124)



premises for residence, coupled with an intention to reside thereon, are usually regarded as sufficient.<sup>84</sup> The premises may, if partly used as a residence, be occupied in part for business purposes,<sup>85</sup> or they may, according to some decisions, be leased in part to others.<sup>86</sup> But, generally, occupation by a tenant is not sufficient to give the homestead exemption to the landlord.<sup>87</sup>

In some states one is allowed a homestead right in a tract of land adjoining that on which the residence is situated, provided, generally, that the tract be used in connection with the residence.<sup>88</sup> And the exemption has been allowed in land adjoining, and used in connection with, the claimant's residence, without reference to his ownership of the latter,

*v. Talbot*, 81 Ky. 23; *Grosholz v. Newman*, 21 Wall. (U. S.) 481; *Fort v. Powell*, 59 Tex. 321; *Currier v. Woodward*, 62 N. H. 63; *Greenman v. Greenman*, 107 Ill. 404.

<sup>84</sup> *Gilworth v. Cody*, 21 Kan. 702; *Hanlon v. Pollard*, 17 Neb. 368; *Cameron v. Gebhard*, 85 Tex. 610, 34 Am. St. Rep. 832; *Woodbury v. Warren*, 67 Vt. 251, 48 Am. St. Rep. 815; *Shaw v. Kirby*, 93 Wis. 379, 57 Am. St. Rep. 927; *Dewille v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 852; *Waples, Homestead*, 193.

<sup>85</sup> *In re Ogburn's Estate*, 105 Cal. 95; *Stevens v. Hollingsworth*, 74 Ill. 202; *Bebb v. Crowe*, 39 Kan. 342; *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244; *Corey v. Schuster*, 44 Neb. 269; *De Ford v. Painter*, 3 Okl. 80. *Contra*, *Johnson v. Moser*, 66 Iowa, 536; *Crow v. Whitworth*, 20 Ga. 38.

<sup>86</sup> *Mercier v. Chace*, 11 Allen (Mass.) 194; *Layson v. Grange*, 48 Kan. 440; *De Ford v. Painter*, 3 Okl. 80; *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108. *Contra*, *Rhodes v. McCormack*, 4 Iowa, 368, 68 Am. Dec. 663; *Hargadene v. Whitfield*, 71 Tex. 482; *Casselmann v. Packard*, 16 Wis. 114, 82 Am. Dec. 710.

<sup>87</sup> *Kaster v. McWilliams*, 41 Ala. 302; *Evans v. Calman*, 92 Mich. 427, 31 Am. St. Rep. 606; *Casselmann v. Packard*, 16 Wis. 114, 82 Am. Dec. 710; *Ashton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197; *Wade v. Wade*, 9 Baxt. (Tenn.) 612; *Maloney v. Hefer*, 75 Cal. 422, 7 Am. St. Rep. 180; *True v. Morrill's Estate*, 28 Vt. 672.

<sup>88</sup> *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Walters v. People*, 18 Ill. 194, 65 Am. Dec. 730; *Medlenka v. Downing*, 59 Tex. 32; *Randal v. Elder*, 12 Kan. 257; *Secombe v. Borland*, 34 Minn. 258; *Perkins v. Quigley*, 62 Mo. 498.



or to whether he has the same quantum of estate in both tracts.<sup>89</sup> In some states the right of homestead extends even to land not adjoining the family residence, if used in connection therewith.<sup>90</sup>

The quantity of land which may be held as exempt from the claims of creditors is limited by the statute, either as regards value or extent, and occasionally as regards both,<sup>91</sup> the limitation being frequently different, according to whether the property is located in a town or city, or in the country,—that is, whether it is an “urban” or a “rural” homestead.<sup>92</sup>

The application of the statutory limitation upon the pecuniary amount of the exemption is with reference to the value of a fee-simple estate in the property, though the claimant of the exemption has only a less estate therein,<sup>93</sup> and the value of improvements is included in the estimate,<sup>94</sup> while the amount of incumbrances is deducted.<sup>95</sup>

<sup>89</sup> *Mason v. Columbia Finance & Trust Co.*, 99 Ky. 117, 59 Am. St. Rep. 451; *Libbey v. Davis*, 68 N. H. 355; *Tyler v. Jewett*, 82 Ala. 93.

<sup>90</sup> *Hodges v. Winston*, 95 Ala. 514, 36 Am. St. Rep. 241; *Bothell v. Sweet* (N. H.) 6 Atl. 646; *Martin v. Hughes*, 67 N. C. 293; *Pryor v. Stone*, 19 Tex. 371, 70 Am. Dec. 341; *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Hastie v. Kelley*, 57 Vt. 293.

<sup>91</sup> *Waples, Homestead*, c. 7.

<sup>92</sup> See *First Nat. Bank of Owatonna v. Wilson*, 62 Ark. 140; *Kiewert v. Anderson*, 65 Minn. 491, 60 Am. St. Rep. 487; *Crilly v. Sheriff*, 25 La. Ann. 219; *McDaniel v. Mace*, 47 Iowa, 509; *Topeka Water-Supply Co. v. Root*, 56 Kan. 187; *Galligher v. Smiley*, 28 Neb. 189, 26 Am. St. Rep. 319; *Taylor v. Boulware*, 17 Tex. 74.

<sup>93</sup> *Brown v. Starr*, 79 Cal. 608, 12 Am. St. Rep. 180; *Yates v. McKibben*, 66 Iowa, 357; *Arnold v. Jones*, 9 Lea (Tenn.) 545; *Franks v. Lucas*, 14 Bush (Ky.) 395.

<sup>94</sup> *Vanstory v. Thornton*, 110 N. C. 10; *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108. Contra, under statute, *Richards v. Nelms*, 38 Tex. 445; *Chase v. Swayne*, 88 Tex. 218.

<sup>95</sup> *Hoy v. Anderson*, 39 Neb. 386, 42 Am. St. Rep. 591; *State v. Mason*, 88 Mo. 222.

— Character of the claimant's interest in the land.

In determining the right to a homestead exemption, the character of his estate in the land is immaterial.<sup>96</sup> A life estate in the land is, accordingly, sufficient to entitle one to assert the right,<sup>97</sup> as is a leasehold estate.<sup>98</sup> A present interest is, however, necessary, and one in remainder or reversion is insufficient, since it does not involve any right of occupancy.<sup>99</sup>

One is entitled to the homestead exemption, though he has an equitable estate only in the land,<sup>100</sup> as when he is occupying the land under a contract of purchase merely.<sup>101</sup> It may be claimed in land subject to a mortgage, though this constitutes a mere "equity of redemption."<sup>102</sup>

In some states, a tenant in common may claim the exemption in the land so concurrently held, if he occupies it

<sup>96</sup> *Waples, Homestead*, 108; *Tyler v. Jewett*, 82 Ala. 93; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350; *Johnson v. Richardson*, 33 Miss. 462; *Sears v. Hanks*, 14 Ohio St. 298, 84 Am. Dec. 378.

<sup>97</sup> *Arnold v. Jones*, 9 Lea (Tenn.) 545; *Kendall v. Powers*, 96 Mo. 142, 9 Am. St. Rep. 326; *Pendergest v. Heekin*, 94 Ky. 384; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350.

<sup>98</sup> *In re Emerson's Homestead*, 58 Minn. 450; *Maatta v. Kippola*, 102 Mich. 116; *Conklin v. Foster*, 57 Ill. 104; *Phillips v. Warner*, (Tex. App.) 16 S. W. 423.

<sup>99</sup> *Murchison v. Plyler*, 87 N. C. 79; *Brokaw v. Ogle*, 170 Ill. 115; *Cornish v. Frees*, 74 Wis. 490; *Howell v. Jones*, 91 Tenn. 402. But if the preceding estate ends before a sale under execution, the exemption may be asserted. *Stern v. Lee*, 115 N. C. 426.

<sup>100</sup> *Bartholomew v. West*, 2 Dill. 290, Fed. Cas. No. 1,071; *Hewitt v. Rankin*, 41 Iowa, 35; *Rice v. Rice*, 108 Ill. 199; *Doane's Ex'r v. Doane*, 46 Vt. 485; *Waples, Homestead*, 117.

<sup>101</sup> *Lessell v. Goodman*, 97 Iowa, 681, 59 Am. St. Rep. 432; *Stafford v. Woods*, 144 Ill. 203; *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743; *Canfield v. Hard*, 58 Vt. 217; *Myrick v. Bill*, 5 Dak. 167; *Alexander v. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158.

<sup>102</sup> *Fellows v. Dow*, 58 N. H. 21; *State v. Mason*, 88 Mo. 222; *Hinson v. Adrian*, 92 N. C. 121; *Doane's Ex'r v. Doane*, 46 Vt. 485.

as a family residence,<sup>103</sup> while in other states a contrary view has been taken.<sup>104</sup>

Land owned by a partnership is, in a number of the states, not exempt from liability for the debts of a partnership because used by one of the partners as a family residence,<sup>105</sup> though in other states it is exempt if all the partners assent to the claim of exemption.<sup>106</sup> The right of one of the copartners to an exemption in his share of the partnership land as against an individual creditor is, it would seem, to be decided with reference to the rule prevailing in the particular jurisdiction in regard to land owned in common, the right to such exemption being, however, contingent upon whether he has himself occupied the land with his family.

— Debts to which the exemption extends.

The existence of the homestead exemption has the effect, generally, of relieving the property from liability for the debts of the owner, but the statute frequently makes exceptions in favor of certain classes of creditors. The statute in almost all the states provides in express terms that

<sup>103</sup> *McClary v. Bixby*, 36 Vt. 254, 84 Am. Dec. 684; *Thorn v. Thorn*, 14 Iowa, 49, 81 Am. Dec. 451; *Clements v. Lacy*, 51 Tex. 150; *Lewis v. White*, 69 Miss. 352, 30 Am. St. Rep. 557; *Lozo v. Sutherland*, 38 Mich. 171; *Giles v. Miller*, 36 Neb. 346, 38 Am. St. Rep. 730.

<sup>104</sup> *Wolf v. Fleischacker*, 5 Cal. 244, 63 Am. Dec. 121; *Thurston v. Maddocks*, 6 Allen (Mass.) 427; *Holmes v. Winchester*, 138 Mass. 542; *West v. Ward*, 26 Wis. 579; *Ventress v. Collins*, 28 La. Ann. 783.

<sup>105</sup> *Trowbridge v. Cross*, 117 Ill. 109; *Brady v. Kreuger*, 8 S. D. 464; *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 58 Am. St. Rep. 490; *Bishop v. Hubbard*, 23 Cal. 514, 83 Am. Dec. 132; *Ex parte Karish*, 32 S. C. 437, 17 Am. St. Rep. 865; *Chalfant v. Grant*, 3 Lea (Tenn.) 118; *Drake v. Moore*, 66 Iowa, 58; *Terry v. Berry*, 13 Nev. 514; *Short v. McGruder* (C. C.) 22 Fed. 46.

<sup>106</sup> *Ferguson v. Speith*, 13 Mont. 487, 40 Am. St. Rep. 459; *McMillan v. Williams*, 109 N. C. 252; *Hunnicutt v. Summey*, 63 Ga. 586; *Swearingen v. Bassett*, 65 Tex. 267.

the exemption of the land from liability for debts shall not extend to a debt to the vendor for the purchase price,<sup>107</sup> and, apart from any such express provision, the land would probably be regarded as liable for such a debt, either on the ground of the existence of a vendor's lien, or by the construction placed upon the statute. But the exemption has been held to extend to a claim for money borrowed to pay the purchase price, this not being within the statutory exception in favor of purchase-money claims,<sup>108</sup> though in some cases the view is taken that, if it is understood between the purchaser and the lender that the loan shall be used in paying the purchase price, the lender may enforce his claim against the homestead.<sup>109</sup>

There is quite frequently a provision that the exemption shall not exist as against debts incurred in improving the premises.<sup>110</sup>

Taxes likewise are usually made enforceable against the homestead, either by the terms of the homestead law or the provisions in regard to sales of land for taxes.<sup>111</sup> Generally

<sup>107</sup> *Waples, Homestead, c. 11.*

<sup>108</sup> *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537; *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336; *Perry v. Ross*, 104 Cal. 15, 43 Am. St. Rep. 66; *Loftis v. Loftis*, 94 Tenn. 232. See *Nottes' Appeal*, 45 Pa. St. 361.

<sup>109</sup> *Acruman v. Barnes*, 66 Ark. 442, 74 Am. St. Rep. 104; *White v. Wheelan*, 71 Ga. 533; *Warhmund v. Merritt*, 60 Tex. 24; *Nichols v. Overacker*, 16 Kan. 54; *Carey v. Boyle*, 53 Wis. 574.

If the loan and the purchase can all be considered one transaction, then the lender is, it seems, entitled to stand in the position of the vendor. *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336.

<sup>110</sup> See *Lewton v. Hower*, 18 Fla. 872; *McWilliams v. Bones*, 84 Ga. 203; *Hurd v. Hixon*, 27 Kan. 722; *All v. Goodson*, 33 S. C. 229; *Miller v. Brown*, 11 Lea (Tenn.) 155; *Butler v. Davis*, 15 Ky. Law Rep. 273, 23 S. W. 220.

<sup>111</sup> *Higgins v. Bordages*, 88 Tex. 458; *Douthett v. Winter*, 108 Ill. 330; *Lamar v. Sheppard*, 80 Ga. 25; *Shell v. Duncan*, 31 S. C. 547; *Waples, Homestead*, 327.



speaking, however, claims of the state stand upon the same plane as the claims of private individuals as regards their enforcement against the homestead property.<sup>112</sup>

In some states the statute is construed as exempting the homestead premises only from claims based on contract, leaving them liable for claims arising from tort; this construction being placed on a provision exempting the premises from liability for "debts contracted."<sup>113</sup> In some states the exemption is effective only as against debts incurred after the acquisition of the property, or after its occupation as a homestead, or after a formal declaration of an intention to claim the homestead rights.<sup>114</sup>

Liens which have attached to the land before its purchase, or before it acquired its homestead character, can be enforced against it.<sup>115</sup>

<sup>112</sup> *Central Kentucky Lunatic Asylum v. Craven*, 98 Ky. 105, 56 Am. St. Rep. 323; *Fink v. O'Neil*, 106 U. S. 272; *Colquitt v. Brown*, 63 Ga. 440; *Ren v. Driskell*, 11 Lea (Tenn.) 642; *State v. Pitts*, 51 Mo. 133.

Accordingly, the homestead has been held to be exempt from sale under execution to satisfy a fine or judgment for costs in a criminal prosecution. *Com. v. Lay*, 12 Bush (Ky.) 283, 23 Am. Rep. 718; *Fink v. O'Neil*, 106 U. S. 272; *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28; *Loomis v. Gerson*, 62 Ill. 11.

<sup>113</sup> *Whiteacre v. Rector*, 29 Grat. (Va.) 714, 26 Am. Rep. 420; *Nowling v. McIntosh*, 89 Ind. 593; *Burton v. Mill*, 78 Va. 468; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *McLaren v. Anderson*, 81 Ala. 106; *Davis v. Henson*, 29 Ga. 345.

<sup>114</sup> *Waples, Homestead*, 282 et seq.

<sup>115</sup> *Bullene v. Hiatt*, 12 Kan. 98; *Meador v. Meador*, 88 Ky. 217; *Robinson v. Wilson*, 15 Kan. 595, 22 Am. Rep. 272; *Pender v. Lancaster*, 14 S. C. 25, 37 Am. Rep. 720; *Dye v. Cooke*, 88 Tenn. 275, 17 Am. St. Rep. 882; *Zander v. Scott*, 165 Ill. 51; *Davis Sewing Mach. Co. v. Whitney*, 61 Mich. 518; *Bunn v. Lindsay*, 95 Mo. 250; *Clements v. Lacy*, 51 Tex. 150.

So in the case of mortgage liens. *Mabry v. Harrison*, 44 Tex. 286; *Spaulding v. Crane*, 46 Vt. 292; *Gibson v. Mundell*, 29 Ohio St. 523; *Webster v. Dundee Mortgage & Trust Co.*, 93 Ga. 278; *McCormick v. Wilcox*, 25 Ill. 274.



The exemption cannot be asserted as against debts which were contracted before the adoption of the law creating or enlarging the right, and under which the right is asserted, since the law, if given such retroactive effect, would impair the obligation of contracts, in violation of the United States constitution.<sup>116</sup>

— **Claim and selection.**

Though, usually, occupancy for residence purposes is sufficient to give to land the homestead character,<sup>117</sup> in some states it is necessary that the owner and occupant also put on record his claim of homestead rights in the property, and the exemption is not effective as against debts incurred before this is done.<sup>118</sup>

The procedure to be adopted in order to secure the exemption in case of issuance of execution against the owner varies greatly in the different states, there usually being a provision for the presentation by the owner of his claim of exemption, and a selection by him of the amount allowed by law from the premises occupied by him.<sup>119</sup>

— **Transfer of the homestead property.**

The requirement which usually exists, that the wife of

<sup>116</sup> *Gunn v. Barry*, 15 Wall. (U. S.) 610; *Edwards v. Kearzey*, 96 U. S. 595; *Tillotson v. Millard*, 7 Minn. 513 (Gil. 419), 82 Am. Dec. 112; *Homestead Cases*, 22 Grat. (Va.) 266, 12 Am. Rep. 507; *Dye v. Cooke*, 88 Tenn. 275, 17 Am. St. Rep. 882.

<sup>117</sup> *Taylor v. Hargous*, 4 Cal. 272, 60 Am. Dec. 606; *Coates v. Caldwell*, 71 Tex. 19, 10 Am. St. Rep. 725; *Green v. Farrar*, 53 Iowa, 426; *Broome v. Davis*, 87 Ga. 584; *Barton v. Drake*, 21 Minn. 299; *Imhoff v. Lipe*, 162 Ill. 282; *Davis v. Day*, 56 Ark. 156; *Riggs v. Sterling*, 60 Mich. 643.

<sup>118</sup> See *Wright v. Westheimer*, 2 Idaho, 962; *Timothy v. Chambers*, 85 Ga. 267, 21 Am. St. Rep. 163; *Boreham v. Byrne*, 83 Cal. 23; *Goodwin v. Colorado Mortgage Inv. Co. of London*, 110 U. S. 1; *Drake v. Root*, 2 Colo. 685; *Threat v. Moody*, 87 Tenn. 143.

<sup>119</sup> See *Waples, Homestead*, c. 22.

the owner join in or consent to any transfer of the homestead property, has been previously discussed.<sup>120</sup> Subject to this requirement, the owner has ordinarily the right to transfer the homestead to the same extent as other property;<sup>121</sup> and creditors cannot object to such action as being fraudulent as against them, since they have no rights against the homestead property in any case.<sup>122</sup> Likewise, the land may, in the absence of express prohibition, be mortgaged by the owner, with the joinder or consent of his wife.<sup>123</sup> By statute, occasionally, however, there is a restriction upon the right to transfer or mortgage the homestead. In one state, for instance, it can be mortgaged only to secure the purchase money or the cost of improvements.<sup>124</sup>

<sup>120</sup> Ante, § 214.

<sup>121</sup> *Waples, Homestead*, 469, 497. See *Larson v. Reynolds*, 13 Iowa, 581, 81 Am. Dec. 444; *Wea Gas, Coal & Oil Co. v. Franklin Land Co.*, 54 Kan. 533, 45 Am. St. Rep. 297; *Moran v. Clark*, 30 W. Va. 359, 8 Am. St. Rep. 66; *Kendall v. Powers*, 96 Mo. 142, 9 Am. St. Rep. 326; *Fishback v. Lane*, 36 Ill. 437; *Greenough v. Turner*, 11 Gray (Mass.) 334; *Giles v. Miller*, 36 Neb. 346, 38 Am. St. Rep. 730; *Ketchin v. McCarley*, 26 S. C. 1, 4 Am. St. Rep. 674; *Barton v. Drake*, 21 Minn. 299; *Rogers v. Adams*, 66 Ala. 600; *Brame v. Craig*, 12 Bush (Ky.) 404; *Astugueville v. Loustauanau*, 61 Tex. 233.

<sup>122</sup> *Bank of Versailles v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621; *Roberts v. Robinson*, 49 Neb. 717, 59 Am. St. Rep. 567; *Tong v. Eifort*, 80 Ky. 152; *Winter v. Ritchie*, 57 Kan. 212, 57 Am. St. Rep. 331; *Castle v. Palmer*, 6 Allen (Mass.) 401; *Smith v. Rumsey*, 33 Mich. 183; *Williams v. Watkins*, 92 Va. 680.

<sup>123</sup> *Preiss v. Campbell*, 59 Ala. 635; *Low v. Anderson*, 41 Iowa, 476; *Jamison v. Bancroft*, 20 Kan. 169; *Hand v. Winn*, 52 Miss. 784; *Grimes v. Portman*, 99 Mo. 229; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66.

<sup>124</sup> Const. Tex. art. 16, § 50. See *Equitable Mortgage Co. v. Norton*, 71 Tex. 683. And in Georgia any mortgage is, it seems, invalid, while a sale is valid only if approved by the court. *Planters' Loan & Sav. Bank v. Dickinson*, 83 Ga. 711. The prohibitions formerly existing in Arkansas and California against the alienation of the homestead property were repealed. *Peterson v. Hornblower*, 33 Cal. 266; *Brown v. Watson*, 41 Ark. 309.

In most of the states the conveyance of the homestead premises, though it involves an abandonment of the homestead, does not give a right to enforce against the land in the hands of the purchaser a judgment which was obtained against the owner of the homestead during his occupancy.<sup>125</sup>

The statute sometimes authorizes the proceeds of the sale of homestead premises to be invested in another homestead, which will be exempt from all the debts from which the previous homestead was exempt,<sup>126</sup> and occasionally the proceeds of sale, pending such reinvestment, are exempt.<sup>127</sup> The proceeds of a sale of the premises under order of court or by judicial process are also usually exempt to the same extent as the premises,<sup>128</sup> and the proceeds of insurance on the property are, in some states, exempt.<sup>129</sup>

<sup>125</sup> *Cummings v. Long*, 16 Iowa, 41, 85 Am. Dec. 502; *Seamans v. Carter*, 15 Wis. 548, 82 Am. Dec. 696; *Elwell v. Hitchcock*, 41 Kan. 130; *Ketchin v. McCarley*, 26 S. C. 1, 4 Am. St. Rep. 674; *Giles v. Miller*, 36 Neb. 346, 38 Am. St. Rep. 730; *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Vanstory v. Thornton*, 112 N. C. 196, 34 Am. St. Rep. 483; *Jones v. Britton*, 102 N. C. 166; *Bonds v. Strickland*, 60 Ga. 624; *Holland v. Kreider*, 86 Mo. 59; *Black v. Epperson*, 40 Tex. 162. Contra, *Denis v. Gayle*, 40 La. Ann. 291; *Whitworth v. Lyons*, 39 Miss. 468. And see the able dissenting opinion in *Vanstory v. Thornton*, *supra*.

<sup>126</sup> *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Watson v. Saxer*, 102 Ill. 585; *Smith v. Gore*, 23 Kan. 488, 33 Am. Rep. 188; *Cooper v. Arnett*, 95 Ky. 603.

The same effect frequently follows when there is a direct exchange of the old homestead for a new one. *Creath v. Dale*, 84 Mo. 349; *Mann v. Corrington*, 93 Iowa, 108, 57 Am. St. Rep. 256; *Schneider v. Bray*, 59 Tex. 668.

<sup>127</sup> *Smith v. Gore*, 23 Kan. 488, 33 Am. Rep. 188; *Schuttloffel v. Collins*, 98 Iowa, 576, 60 Am. St. Rep. 216; *Hewett v. Allen*, 54 Wis. 583; *Prugh v. Portsmouth Sav. Bank*, 48 Neb. 414.

<sup>128</sup> *Swandale v. Swandale*, 25 S. C. 389; *Keyes v. Rines*, 37 Vt. 260, 86 Am. Dec. 707; *Jackson v. Reid*, 32 Ohio St. 443; *Simpson v. Biffle*, 63 Ark. 289.

<sup>129</sup> *Culbertson v. Cox*, 29 Minn. 309, 43 Am. Rep. 204; *Cameron v. Fay*, 55 Tex. 58; *Houghton v. Lee*, 50 Cal. 101. Contra, *Smith v. Rat-*

The statute does not usually prohibit a testamentary disposition of the homestead premises by the owner, but such right is frequently restricted by the provisions giving the surviving consort and children certain rights in the land. Occasionally, but not frequently, a prohibition in general terms of a transfer or alienation by the husband alone has been held to apply to a transfer by will.<sup>130</sup>

— **Loss of rights by abandonment.**

The right to the homestead exemption in particular land is lost by the abandonment of the land as a place of residence.<sup>131</sup> But to constitute an abandonment, a removal from the property must be permanent, without an intention to return.<sup>132</sup> An abandonment is not necessarily shown by the fact that the owner leases the homestead property to a tenant, provided the owner's absence therefrom is but temporary.<sup>133</sup>

— **Waiver of rights.**

The right to hold land exempt from forced sale for debts

cliff, 66 Miss. 683, 14 Am. St. Rep. 606; *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128.

<sup>130</sup> *Waples, Homestead*, c. 14.

<sup>131</sup> *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247; *Fyffe v. Beers*, 18 Iowa, 4, 85 Am. Dec. 577; *Kaes v. Gross*, 92 Mo. 648, 1 Am. St. Rep. 767; *Shepherd v. Cassiday*, 20 Tex. 26, 70 Am. Dec. 372; *Foster v. Leland*, 141 Mass. 187; *Niehaus v. Faul*, 43 Ohio St. 63.

<sup>132</sup> *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Taylor v. Boulware*, 17 Tex. 74, 67 Am. Dec. 642; *Kenley v. Hudelson*, 99 Ill. 493, 39 Am. Rep. 31; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767; *McDermott v. Kernan*, 72 Wis. 268, 7 Am. St. Rep. 864; *Boot v. Brewster*, 75 Iowa, 631, 9 Am. St. Rep. 515; *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607; *Central Kentucky Lunatic Asylum v. Craven*, 98 Ky. 105, 56 Am. St. Rep. 323.

<sup>133</sup> *Stewart v. Brand*, 23 Iowa, 477; *Dulanty v. Pynchon*, 6 Allen (Mass.) 510; *Wiggins v. Chance*, 54 Ill. 175; *Herrick v. Graves*, 16 Wis. 163; *Earll v. Earll*, 60 Mich. 30; *Wetz v. Beard*, 12 Ohio St. 431. (1134)

may, as before stated, be in effect waived as to a debt secured by mortgage on the land. Under the statutes or decisions of a number of courts, moreover, the owner of land may, by agreement, waive the right of exemption as regards a particular debt, provided, usually, the waiver be in writing, and the wife join therein.<sup>134</sup> In some states, however, one cannot agree not to assert the right as against a particular debt.<sup>135</sup> Whether the owner impliedly waives his right of exemption by failure to assert it at the time of an attempted sale of the land at the instance of creditors is a question on which the decisions are in direct conflict.<sup>136</sup>

— **Federal homestead exemption.**

The acquisition of public lands by individuals under the United States homestead law has been before referred to. The purpose of this law is primarily entirely different from the state homestead exemption laws, though they bear similar names. There is, however, one point of resemblance, in that the statute providing for the acquisition of public land by one establishing a home thereon declares that the land so acquired shall be exempt from liability to forced sale for debts incurred previous to the issuance of a patent therefor.<sup>137</sup>

§ 500. **Restrictions in creation of estate.—Estate in fee simple.**

A legal estate in fee simple cannot, by the terms of its creation, be made subject to a provision that it shall not be

<sup>134</sup> *Crum v. Sawyer*, 132 Ill. 443; *Foley v. Cooper*, 43 Iowa, 376; *Littlejohn v. Egerton*, 76 N. C. 468; *Crout v. Sauter*, 13 Bush (Ky.) 442; *Dye v. Mann*, 10 Mich. 291; *Ferguson v. Kumler*, 25 Minn. 183.

<sup>135</sup> *Terrell v. Hurst*, 76 Ala. 588; *Tanner v. Mutual Benefit Building Ass'n*, 95 Ga. 528.

<sup>136</sup> *Waples, Homestead*, 729.

<sup>137</sup> Rev. St. U. S. § 2296.



transferred by its owner; and this is the case, whether such a provision takes the form of a condition, special limitation, or executory limitation, terminating the estate upon an attempted transfer,<sup>138</sup> or the form merely of a prohibition of such a transfer.<sup>139</sup> A provision is also void, it seems, which undertakes to restrict the right of transfer in one particular way, as by preventing the disposition of the property *inter vivos*, or by mortgage, or by will.<sup>140</sup> As to the validity of a condition that the tenant of a fee-simple estate shall not transfer it to a particular person or persons, the authorities are in conflict.<sup>141</sup> A condition that he can transfer it only to a certain class of persons is, by the weight of authority, invalid.<sup>142</sup> The fact that a restriction upon

<sup>138</sup> Litt. § 360; Co. Litt. 223a; 2 Jarman, Wills, 855; In re Rosher, 26 Ch. Div. 801, 6 Gray's Cas. 62; In re Dugdale, 38 Ch. Div. 176, 6 Gray's Cas. 73; Potter v. Couch, 141 U. S. 296; Winsor v. Mills, 157 Mass. 362; Hardy v. Galloway, 111 N. C. 519, 32 Am. St. Rep. 828; Turley v. Massengill, 7 Lea (Tenn.) 353; Mutual Benefit Life Ins. Co. v. Grace Church, 53 N. J. Eq. 413.

So, a provision imposing a penalty to be charged on the land, in case of a transfer of a fee simple, is invalid. *De Peyster v. Michael*, 6 N. Y. 467; In re Rosher, 26 Ch. Div. 806, 6 Gray's Cas. 62. As is a similar provision in the case of a fee tail. *King v. Burchell*, Amb. 379, 6 Gray's Cas. 31; Gray, Restraints Alien. Prop. § 25.

<sup>139</sup> Gray, Restraints Alien. Prop. §§ 105, 113; Murray v. Green, 64 Cal. 363; Winsor v. Mills, 157 Mass. 362; Oxley v. Lane, 35 N. Y. 340; Mandlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61; *McWilliams v. Nisly*, 2 Serg. & R. (Pa.) 507, 7 Am. Dec. 654.

<sup>140</sup> In re Rosher, 26 Ch. Div. 801, 6 Gray's Cas. 62; *Ware v. Cann*, 10 Barn. & C. 433, 6 Gray's Cas. 42. See *Cushing v. Spalding*, 164 Mass. 287; Gray, Restraints Alien. Prop. § 55 et seq.

<sup>141</sup> That such a condition is valid, see Litt. § 361; Co. Litt. 223; Winsor v. Mills, 157 Mass. 362 (dictum); *Cowell v. Colorado Springs Co.*, 100 U. S. 55 (dictum). That it is invalid, see 4 Kent's Comm. 131; *Barnard's Lessee v. Bailey*, 2 Har. (Del.) 56; *Williams v. Jones*, 2 Swan (Tenn.) 620. See *Good v. Fichthorn*, 144 Pa. St. 287.

<sup>142</sup> *Attwater v. Attwater*, 18 Beav. 330, 6 Gray's Cas. 46; In re Rosher, 26 Ch. Div. 801, 6 Gray's Cas. 62; *Anderson v. Cary*, 36 Ohio St. 506, 6 Gray's Cas. 86; *Schermerhorn v. Negus*, 1 Denio (N. (1136)

the power of alienating a fee simple is to endure for a limited time only does not, by the weight of authority, render the restriction valid if the estate in fee simple is vested.<sup>143</sup> If, however, the interest is not vested, but is contingent upon the happening of a certain event,—that is, if it is merely an executory interest or contingent remainder,—the fact that, in addition to the happening of such event, the nonalienation of the interest is a condition precedent to the vesting, such provision against alienation until the time of vesting is valid.<sup>144</sup>

The rule invalidating a provision in connection with a legal fee-simple estate, restricting the right of transfer, applies to a provision against involuntary as well as voluntary transfer, as in the case of a provision terminating the estate in case of the bankruptcy of the tenant, or a sale under a judgment against him, or merely providing that it shall not be liable for debts.<sup>145</sup>

Y.) 448. See *Morse v. Blood*, 68 Minn. 442. This view is approved by Gray, *Restraints Alien. Prop.* § 41. *Contra*, *Doe d. Gill v. Pearson*, 6 East, 173, 6 Gray's Cas. 37; *In re Macleay*, L. R. 20 Eq. 186, 6 Gray's Cas. 53.

<sup>143</sup> *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *In re Rosher*, 26 Ch. Div. 801, 6 Gray's Cas. 62; *Potter v. Couch*, 141 U. S. 296; *Anderson v. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602, 6 Gray's Cas. 86; 2 *Jarman*, Wills. 860; Gray, *Restraints Alien. Prop.* §§ 47-54, where numerous cases containing dicta to the contrary are cited.

In *Fowlkes v. Wagoner* (Tenn. Ch. App.) 46 S. W. 586, it is stated, in the course of an elaborate opinion, that such a restriction is valid if the estate is to be terminated upon the making of the alienation. In that case, however, there was no provision for cesser. There are dicta in other cases to the same effect. See *Camp v. Cleary*, 76 Va. 140; *Bridge v. Ward*, 35 Wis. 687.

<sup>144</sup> *Large's Case*, 2 Leon. 82, 3 Leon. 182; *Bank of State v. Forney*, 37 N. C. 181; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61.

<sup>145</sup> *In re Dugdale*, 38 Ch. Div. 176; *Van Osdel v. Champion*, 89 Wis. 661; *Hahn v. Hutchinson*, 159 Pa. St. 133, 138; *McCleary v. Ellis*, 54 Iowa, 311, 37 Am. Rep. 205.

The rule that an estate in fee simple necessarily involves the right of transfer has also usually been applied to the case of an equitable as well as of a legal estate in fee simple, it being held that a beneficiary, or all the beneficiaries, of a trust, if in existence and *sui juris*, may demand a conveyance of the legal title from the trustee, and thus obtain absolute control over the property, including the right of alienation;<sup>146</sup> that such property will pass to an assignee in bankruptcy;<sup>147</sup> and that the creditor of a beneficiary may proceed in equity to subject the equitable interest to his claim.<sup>148</sup> It has recently, however, been held in this country that the trust will not be so terminated by compelling a conveyance of the legal title, if this is plainly not in accord with the purpose of the creator of the trust,<sup>149</sup> and that, on the same principle, the creditors of a beneficiary cannot reach the *corpus* of the fund.<sup>150</sup>

In the case of the "equitable separate estate" of a married woman, though she has a fee-simple interest therein, she may, by the terms of the settlement upon her, be restrained from transferring the property, or from anticipating the income, this being merely an application by the courts to her fee-simple interest of the rule previously recognized in cases in which she had merely a life interest.<sup>151</sup>

<sup>146</sup> Ante, § 101.

<sup>147</sup> *Sanford v. Lackland*, 2 Dill. 6, Fed. Cas. No. 12,312, 6 Gray's Cas. 138.

<sup>148</sup> *Mebane v. Mebane*, 39 N. C. 131, 6 Gray's Cas. 134; *Marshall's Trustee v. Rash*, 87 Ky. 116; *Sears v. Choate*, 146 Mass. 395. So, to the effect that a provision that the equitable estate shall not be liable for the debts of the cestui que trust is invalid. *Taylor v. Harwell*, 65 Ala. 1; *Turley v. Massengill*, 7 Lea (Tenn.) 353.

<sup>149</sup> *Clafin v. Clafin*, 149 Mass. 19, 6 Gray's Cas. 141; *Cuthbert v. Chauvet*, 136 N. Y. 326; *Gunn v. Brown*, 63 Md. 96. See ante, § 101.

<sup>150</sup> *Goe's Estate*, 146 Pa. St. 431; *Weller v. Noffsinger*, 57 Neb. 455.

<sup>151</sup> *Baggett v. Meux*, 1 Phillips, 627, 6 Gray's Cas. 131; *In re Currey*, 32 Ch. Div. 361; *Wells v. McCall*, 64 Pa. St. 207; 2 *Perry, Trusts*, § 671; *Gray, Restraints Alien. Prop.* § 125.

The principle involved in the above decisions—that land cannot be transferred subject to provisions restricting the freedom of alienation by those beneficially entitled—is sometimes applied as a ground for deciding that a noncharitable trust which, by its terms, may continue indefinitely, owing to the absence of any definite *cestui que trust*, who may call for a transfer of the legal estate, or may alien the beneficial interest, is void as creating a perpetuity.<sup>152</sup> In other cases, however, such a trust is regarded as void, owing, not to the possibility of its indefinite continuance, but rather because there is no person in whose favor it can be enforced by the courts.<sup>153</sup>

#### — Estates in fee tail.

The right of a tenant in tail to transfer the land by a common recovery, or a fine levied in accordance with certain statutes, and so to bar the entail, has been recognized as an essential incident of the estate, of which it cannot be de-

<sup>152</sup> *Thompson v. Shakespear*, 1 De Gex, F. & J. 399; *Cocks v. Manners*, L. R. 12 Eq. 574; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; *Brannigan v. Murphy* [1896] 1 Ir. 418; *Piper v. Moulton*, 72 Me. 155; *Bates v. Bates*, 134 Mass. 110; *Coit v. Comstock*, 51 Conn. 352; *Williams v. Herrick*, 19 R. I. 197; *Johnson v. Holifield*, 79 Ala. 423; *Pennoyer v. Wadhams*, 20 Or. 274; *Detwiller v. Hartman*, 37 N. J. Eq. 347; *Hartson v. Elden*, 50 N. J. Eq. 522; *Moore's Ex'r v. Moore*, 50 N. J. Eq. 554; *Brown v. Esterhazy* (D. C.) 25 Wash. Law Rep. 478.

This view is sometimes expressed by a declaration that the trust is in violation of the "rule against perpetuities," a use of the latter phrase calculated to create confusion between this and the rule against remoteness. See article by John C. Gray, Esq., in 15 Harv. Law Rev. 509, and ante, § 152.

<sup>153</sup> *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 521; *Chamberlain v. Stearns*, 111 Mass. 267; *Adye v. Smith*, 44 Conn. 60; *Holland v. Alcock*, 108 N. Y. 312; *Lewin, Trusts*, 139; *Perry, Trusts*, §§ 116, 711. As to the application of this requirement of definiteness in the case of a charity, see ante, § 49.

prived by any provision in the instrument creating it;<sup>154</sup> and the statutory right of barring the entail by a conveyance no doubt stands upon the same footing.

— Estates for life.

In the case of a legal or equitable estate for life, a condition or limitation which terminates the estate upon its attempted transfer by him, or upon its involuntary transfer away from him on behalf of his creditors, as upon his bankruptcy, or upon a sale under a judgment, is valid,<sup>155</sup> except when the condition or limitation is created in a settlement made by himself, at least as regards the involuntary alienation of the property.<sup>156</sup>

A provision attached to the creation of a legal estate for life, not that it shall terminate upon an attempt to transfer it, but declaring in effect that such an attempt, whether made by the life tenant himself, or by or in behalf of his creditors, shall be utterly nugatory, is invalid.<sup>157</sup>

In the case of an equitable, as distinct from a legal, estate for life, it has been held in many states, under the doctrine of "spendthrift trusts," in opposition to the well-set-

<sup>154</sup> Portington's Case, 10 Coke, 35b; Gray, Restraints Alien. Prop. § 77; Stansbury v. Hubner, 73 Md. 228.

<sup>155</sup> Gray, Restraints Alien. Prop. § 78 et seq.; Lockyer v. Savage, 2 Strange, 947, 6 Gray's Cas. 91; Rochford v. Hackman, 9 Hare, 475, 6 Gray's Cas. 108; Nichols v. Eaton, 91 U. S. 716, 6 Gray's Cas. 171; Jackson v. Groat, 7 Cow. (N. Y.) 285; Bull v. Kentucky Nat. Bank, 90 Ky. 452.

<sup>156</sup> That is, a man cannot settle his own property on himself, so that, when he becomes bankrupt, or when his creditors otherwise take measures to reach the property, it will pass to another person. On the question whether he can settle property on himself for life, with a provision that his interest shall terminate if he attempts to transfer it, the decisions are not in accord. See Gray, Restraints Alien. Prop. §§ 90-100.

<sup>157</sup> Gray, Restraints Alien. Prop. § 134; Wellington v. Janvrin, 60 N. H. 174; Bridge v. Ward, 35 Wis. 687; McCormick Harvesting Mach. Co. v. Gates, 75 Iowa, 343; Todd v. Sawyer, 147 Mass. 570; Hahn v. Hutchinson, 159 Pa. St. 133.



tled rules of the English courts, as well as in opposition to some decisions and *dicta* in this country,<sup>158</sup> that property may be settled in trust for a person for life, without any power in him to alienate it or anticipate the income, and free from liability for his debts.<sup>159</sup> But even in the states where this view obtains, a person cannot settle his own property in trust in his own favor, so that it will be exempt from the claims of his creditors, while he retains the enjoyment of the income.<sup>160</sup>

The equitable separate estate of a married woman, both in England and in this country, may, by the terms of the settlement upon her, be enjoyed by her, so far as regards the income, without the power of alienating the *corpus* of the fund, or of anticipating the income, and free from the claims of creditors, this relaxation of the ordinary rule being based on the theory that, since the separate estate is the creature of equity, and otherwise the wife has, apart from modern statutes, no power of alienation, the allowance by equity of a modification of such power is merely a partial return to the common-law view of a married woman.<sup>161</sup>

<sup>158</sup> *Brandon v. Robinson*, 1 Rose, 197, 6 Gray's Cas. 145; *Barton v. Briscoe*, Jac. 603, 6 Gray's Cas. 150; *Graves v. Dolphin*, 1 Sim. 66, 6 Gray's Cas. 152; *Tillinghast v. Bradford*, 5 R. I. 205, 6 Gray's Cas. 169; *Heath v. Bishop*, 4 Rich. Eq. (S. C.) 46; *Bailie v. McWhorter*, 56 Ga. 183; *Robertson v. Johnston*, 36 Ala. 197.

<sup>159</sup> *Fisher v. Taylor*, 2 Rawle (Pa.) 33, 6 Gray's Cas. 166; *Overman's Appeal*, 88 Pa. St. 276, 6 Gray's Cas. 180; *Nichols v. Eaton*, 91 U. S. 716, 6 Gray's Cas. 171; *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 6 Gray's Cas. 187; *Steib v. Whitehead*, 111 Ill. 247; *Lampert v. Haydel*, 96 Mo. 439; *Roberts v. Stevens*, 84 Me. 325; *Leigh v. Harrison*, 69 Miss. 923; *Smith v. Towers*, 69 Md. 77; *Weller v. Noffsinger*, 57 Neb. 455; *Barnes v. Dow*, 59 Vt. 530.

<sup>160</sup> *Pacific Nat. Bank v. Windram*, 133 Mass. 175, 6 Gray's Cas. 190; *Jackson v. Von Zedlitz*, 136 Mass. 342; *Mackason's Appeal*, 42 Pa. St. 330; *Ghormley v. Smith*, 139 Pa. St. 584; *Warner v. Rice*, 66 Md. 436. In many states there is an express statutory provision that any transfer or declaration of a trust for the benefit of the grantor is invalid as against present or future creditors. 1 *Stimson's Am. St. Law*, § 4594.

— **Estates for years.**

A condition or limitation, by which a term of years is, in favor of the landlord, to terminate upon voluntary or involuntary alienation away from the tenant, is valid;<sup>162</sup> but a lessee cannot, on transferring the term, impose any restrictions upon alienation by his transferee, since this would be equivalent to imposing a restriction upon the transfer of an absolute interest in personalty.<sup>163</sup> Furthermore, as in the case of a legal life estate, a provision that the term shall not be transferred, but that, in spite of any such attempt by the tenant or his creditors, it shall still belong to him, is, it seems, invalid.<sup>164</sup>

— **Statutory provisions.**

In New York, in connection with the restrictions upon the creation of express trusts in land, there are provisions to the effect that no person beneficially interested in a trust for the receipt of the rents and profits of land can transfer his interest, but that the surplus of such rents and profits beyond the sum necessary for the education and support of the beneficiary shall be liable in equity to the claims of creditors. The provisions have been the subject of many decisions, not always of an harmonious character.<sup>165</sup> In some other states there are provisions of a more or less similar nature.<sup>166</sup>

<sup>161</sup> *Jackson v. Hobhouse*, 2 Mer. 483, 6 Gray's Cas. 147; *Stogdon v. Lee* [1891] 1 Q. B. 661; *Perry, Trusts*, §§ 670, 671; 2 *Jarman, Wills*, 779; *Gray, Restraints Alien. Prop.* §§ 270, 271. The restraining clause ceases to have any effect when the coverture ends by the husband's death. *Barton v. Briscoe*, Jac. 603, 6 Gray's Cas. 150.

<sup>162</sup> *Roe d. Hunter v. Galliers*, 2 Term R. 133, 6 Gray's Cas. 92; *Gray, Restraints Alien. Prop.* § 46. See ante, § 46.

<sup>163</sup> *Co. Litt.* 223a; *Gray, Restraints Alien. Prop.* §§ 27, 102.

<sup>164</sup> *Hobbs v. Smith*, 15 Ohio St. 419; *Gray, Restraints Alien. Prop.* § 278.

<sup>165</sup> See *Chaplin, Exp. Powers*, § 496, 705-710; *Gray, Restraints Alien. Prop.* Appendix I A.

<sup>166</sup> *Gray, Restraints Alien. Prop.* Appendix I B.

## CHAPTER XXXIV.

### PERSONAL DISABILITIES AS TO THE TRANSFER OF LAND.

- § 501. Married women.
- 502. Infants.
- 503. Persons mentally incapacitated.
- 504. Corporations.
- 505. Aliens.
- 505a. Criminals.

A married woman may transfer land by a conveyance *inter vivos*, in which her husband joins, and, in some states, without his joinder; and she can usually transfer it by will without his joinder. The common-law rule that a conveyance directly between the husband and wife is void is still the law in many states, though a conveyance from him to her, if meritorious, is upheld in equity.

A conveyance *inter vivos* by an infant may usually be avoided by him after arriving at majority, or, in case of his death, by his successors in interest. A conveyance to him may likewise be avoided by him after arriving at majority. The age at which one can make a transfer by will is fixed by statute in the different states.

A conveyance by one mentally incapacitated is by some decisions absolutely void, and, by others, merely voidable, and in some states it is valid in favor of an innocent purchaser for value. A will made by one so incapacitated is void.

A corporation has power to acquire land so far as is reasonably incidental to the purposes of its creation, and may transfer it in carrying out such purposes.

At common law, while an alien could acquire land by voluntary conveyance, and hold it till dispossessed by the state, he could not acquire it by act of the law, as by descent, nor could

relationship be traced from or through him for the purpose of claiming by descent. In many states these disabilities have been entirely removed by statute, and in other states considerably restricted.

§ 501. Married women.

At common law, a married woman could not dispose of her land by her sole deed, and could convey it even in conjunction with her husband only by the levy of a fine.<sup>1</sup> In this country a conveyance jointly with her husband, acknowledged by her apart from him, was, however, at a quite early date, substituted for a conveyance by means of a fine,<sup>2</sup> and this mode of conveyance is no doubt legal in all the states. In most states, moreover, at the present day, the formality of a separate acknowledgment by the wife is dispensed with, and the statutes extending her rights over her property free from any control by her husband have in some states given her power to convey her lands by a conveyance executed by her alone, without the joinder of her husband.<sup>3</sup> Such right of sole transfer has for many years been recognized by courts of equity in connection with her equitable separate estate, the right being, however, in some jurisdictions, dependent upon an express grant of the power of disposition in the instrument creating the estate.<sup>4</sup>

The later decisions, under the influence, more or less direct, of the statutes enlarging the powers of married women,

<sup>1</sup> 1 Bl. Comm. 444; 2 Bl. Comm. 293; 2 Kent's Comm. 150; Williams, Real Prop. (18th Ed.) 288; Albany Fire Ins. Co. v. Bay, 4 N. Y. 9, Finch's Cas. 987.

<sup>2</sup> Schouler, Domestic Relations, § 94; Manchester v. Hough, 5 Mason, 67, Fed. Cas. No. 9,005; Fowler v. Shearer, 7 Mass. 14; Jackson v. Gilchrist, 15 Johns. (N. Y.) 89, 110.

<sup>3</sup> 1 Stimson's Am. St. Law, § 6500, where the statutory provisions are summarized.

<sup>4</sup> 2 Story, Eq. Jur. § 1392 et seq.; 2 Pomeroy, Eq. Jur. §§ 1104, 1105; ante, § 177.

uphold conveyances made in her behalf by a person holding her power of attorney;<sup>5</sup> and the fact that her attorney is her husband, and that he executes the conveyance in his own right, as well as in her behalf, does not render it invalid.<sup>6</sup>

At common law the husband could dissent from, and so invalidate, a transfer made to the wife.<sup>7</sup> The modern statutes excluding the husband's rights in her property, and his control thereover, are, however, inconsistent with the existence of any such right in him.

— Conveyances between husband and wife.

At common law, a conveyance by a married woman directly to her husband was void, they being regarded in law as but one person, and this is still quite generally the rule, in spite of the statutes enlarging her property rights.<sup>8</sup> Un-

<sup>5</sup> In such cases, the power of attorney has usually been executed by the husband jointly with the wife. *Williams v. Paine*, 169 U. S. 55; *Hull v. Glover*, 126 Ill. 122; *Fulweiler v. Baugher*, 15 Serg. & R. (Pa.) 45. Except when the husband himself is appointed attorney, as to which see cases in next note.

In a number of states there is a statutory provision authorizing the wife to convey by attorney. 1 *Stimson's Am. St. Law*, § 6506. Contra, to the effect that the wife cannot convey an interest in land by attorney, see *Dawson v. Shirley*, 6 Blackf. (Ind.) 531; *King v. Nutall*, 7 Baxt. (Tenn.) 221; *Batte v. McCaa*, 44 Ark. 398; *Earle's Adm'rs v. Earle*, 20 N. J. Law, 347; *Sumner v. Conant*, 10 Vt. 9; *Mott v. Smith*, 16 Cal. 533.

<sup>6</sup> *Weisbrod v. Chicago & N. W. Ry. Co.*, 18 Wis. 35, 86 Am. Dec. 743; *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273; *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661.

<sup>7</sup> Co. Litt. 3a; 2 Bl. Comm. 293; 2 Kent's Comm. 150; Schouler, *Domestic Relations*, § 92; *Melvin v. Proprietors of Locks & Canals on Merrimack River*, 16 Pick. (Mass.) 161, 167; *Baxter v. Smith*, 6 Binn. (Pa.) 427, *Finch's Cas.* 980.

<sup>8</sup> 1 *Roper, Husb. & Wife*, 53; *Brooks v. Kearns*, 86 Ill. 547; *Preston v. Fryer*, 38 Md. 221; *Luntz v. Greve*, 102 Ind. 173; *White v. Wager*, 25 N. Y. 328; *Rico v. Brandenstein*, 98 Cal. 465.



der some statutes, however, she may make such a conveyance to him as freely as to other persons, the statute expressly giving her the same rights to alien her separate property as if she were unmarried.<sup>9</sup> She might, even at common law, convey land to a third person, to be conveyed to the husband, in the absence of any coercion or undue influence on the husband's part.<sup>10</sup>

At common law, the husband could not convey to the wife, and this rule still exists in some jurisdictions.<sup>11</sup> In others it has been changed by the modern statutes with reference to married women.<sup>12</sup> Land could, however, always be transferred indirectly from the husband to the wife by making use of a third person as a conduit of title,<sup>13</sup> and a conveyance directly from the husband to the wife, not in fraud of his creditors, and otherwise meritorious in character, has usually been upheld in equity as a settlement on the wife.<sup>14</sup>

<sup>9</sup> Wells v. Caywood, 3 Colo. 487; Savage v. Savage, 80 Me. 472; Robertson v. Robertson, 25 Iowa, 350.

<sup>10</sup> Scarborough v. Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; Gebb v. Rose, 40 Md. 387; Jackson v. Stevens, 16 Johns. (N. Y.) 110; Jasper v. Maxwell, 16 N. C. 357; Garvin v. Ingram, 10 Rich. Eq. (S. C.) 130; Shepperson v. Shepperson, 2 Grat. (Va.) 501.

<sup>11</sup> 1 Bl. Comm. 442; 2 Kent's Comm. 129; Shepard v. Shepard, 7 Johns. Ch. (N. Y.) 57; Carrington v. Richardson, 79 Ala. 101; Coates v. Gerlach, 44 Pa. St. 43; Frissell v. Rozier, 19 Mo. 448; Loomis v. Brush, 36 Mich. 40; Johnson v. Vandervort, 16 Neb. 144; Humphrey v. Spencer, 36 W. Va. 11; Wilder v. Brooks, 10 Minn. 50 (Gil. 32), 88 Am. Dec. 49; Crooks v. Crooks, 34 Ohio St. 610.

<sup>12</sup> Baygents v. Beard, 41 Miss. 531; Walker v. Long, 109 N. C. 510; Burdeno v. Amperse, 14 Mich. 91; Booker v. Worrill, 55 Ga. 332.

<sup>13</sup> Jewell v. Porter, 31 N. H. 34; McMillan v. Cheeney, 30 Minn. 519. And this could be effected, under the Statute of Uses, by a conveyance to a third person of the legal title, to the use of the wife, the use being executed by the statute in the latter. 1 Roper, Husb. & Wife, 53.

<sup>14</sup> Moore v. Page, 111 U. S. 117; Jones v. Clifton, 101 U. S. 228; Powe v. McLeod, 76 Ala. 418; Shepard v. Shepard, 7 Johns. Ch. (N. Y.) 57, 11 Am. Dec. 396; Albright v. Albright, 70 Wis. 528; Wilder v. Brooks, 10 Minn. 50 (Gil. 32), 88 Am. Dec. 49; Vought's Ex'rs v. (1146)

—— Transfer by will.

Under the English Statute of Wills, as declared by a statute passed two years later, a married woman had no power to dispose of her legal interest in lands,<sup>15</sup> nor could she so dispose at common law of her legal personal property, since this belonged to the husband.<sup>16</sup> In most of the states she can, at the present day, dispose of her real or personal property by will without her husband's consent, as if sole,<sup>17</sup> and she can, in all jurisdictions, so dispose of her equitable separate estate.<sup>18</sup>

§ 502. Infants.

At common law, any person under the age of twenty-one is an infant; but by statute in a number of states the period of infancy is, in the case of females, reduced to eighteen years, and, in some, the marriage of a female infant gives her the powers of an adult married woman.<sup>19</sup>

A transfer *inter vivos* of an estate or interest in land by an infant is voidable, though not void,—that is, it is effective to transfer title unless it is repudiated by him after attaining his majority;<sup>20</sup> and it may be repudiated by him,

Vought, 50 N. J. Eq. 177; Johnson v. Vandervort, 16 Neb. 144; Wells v. Wells, 35 Miss. 638; Furrow v. Athey, 21 Neb. 671, 59 Am. Rep. 867; Turner v. Shaw, 96 Mo. 22, 9 Am. St. Rep. 319; Coates v. Gerlach, 44 Pa. St. 43; Crooks v. Crooks, 34 Ohio St. 610; Humphrey v. Spencer, 36 W. Va. 11.

<sup>15</sup> 34 & 35 Hen. VIII. c. 5, § 14.

<sup>16</sup> 1 Jarman, Wills, 39, Bigelow's note.

<sup>17</sup> 1 Stimson's Am. St. Law, § 6460; 1 Woerner, Administration, § 21.

<sup>18</sup> 1 Jarman, Wills, 41; 2 Perry, Trusts, § 668.

<sup>19</sup> 1 Bl. Comm. 463; 2 Kent's Comm. 233; 1 Stimson's Am. St. Law, § 6601.

<sup>20</sup> Irvine v. Irvine, 9 Wall. (U. S.) 617; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Slaughter v. Cunningham, 24 Ala. 260, 60 Am. Dec. 463; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445; Green v. Wilding, 59 Iowa, 679, 44 Am. Rep. 696; Logan v. Gardner, 136 Pa. St. 588, 20

although the grantee has conveyed to a *bona fide* purchaser without notice.<sup>21</sup> The right to avoid a conveyance made by an infant does not, however, extend to conveyances made by him in the execution of a trust, or as the holder of a bare legal title.<sup>22</sup> In some cases, under particular circumstances, equity has held the grantor estopped to assert his infancy if he induced one to pay a consideration for the land by false representations as to his age.<sup>23</sup>

An infant married woman stands, in respect to her right to avoid any conveyance made by her, upon the same footing as any other infant, and her disability of infancy is not re-

Am. St. Rep. 939; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, and note; *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665.

Though a conveyance of land by an infant is thus subject to avoidance by him, a binding sale and conveyance of his land may, as before stated, in most jurisdictions, be effected by a judicial proceeding. See ante, § 463.

<sup>21</sup> *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Brantley v. Wolf*, 60 Miss. 420; *Jenkins v. Jenkins*, 12 Iowa, 195; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 340, 76 Am. Dec. 209; *Sims v. Smith*, 86 Ind. 577; *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629.

<sup>22</sup> *Tucker's Lessee v. Moreland*, 10 Pet. (U. S.) 58, 67; *Nordholt v. Nordholt*, 87 Cal. 552, 22 Am. St. Rep. 268; *Prouty v. Edgar*, 6 Iowa, 353; *Bridges v. Bidwell*, 20 Neb. 185; *Starr v. Wright*, 20 Ohio St. 97; *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488.

<sup>23</sup> *Hayes v. Parker*, 41 N. J. Eq. 630; *Ferguson v. Bobo*, 54 Miss. 121; *Ryan v. Growney*, 125 Mo. 474; *Schmitzheimer v. Eiseman*, 7 Bush (Ky.) 298; *Alt v. Graff*, 65 Minn. 191; *Patterson v. Lawrence*, 90 Ill. 174; 1 Story, Eq. Jur. § 385; 2 Pomeroy, Eq. Jur. § 945. See *Thormaehlen v. Kaepfel*, 86 Wis. 378; *Vogelsang v. Null*, 67 Tex. 465. But see *Sims v. Everhardt*, 102 U. S. 300; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676; *Brown v. McCune*, 5 Sandf. (N. Y.) 228; *Studwell v. Shapter*, 54 N. Y. 249; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40. In some states the statute prohibits the disaffirmance of a contract by an infant if the action of the other party in entering therein was induced by the infant's misrepresentations. 1 Stimson's Am. St. Law, § 6602(D).

moved by a statute authorizing married women to make conveyances.<sup>24</sup>

At common law, an infant's conveyance by livery of seisin could be avoided only by an act of equal solemnity, such as an entry, and it has sometimes been stated that the avoidance of any conveyance must be by an act of equal notoriety with the conveyance.<sup>25</sup> The modern view generally is, however, that any act indicative of an intention to repudiate the conveyance is sufficient.<sup>26</sup> Accordingly, an avoidance of the conveyance has been held to have been effected, not only by an entry upon the land,<sup>27</sup> but also by an action of ejectment by the infant to recover the land,<sup>28</sup> a suit by him to set aside the conveyance,<sup>29</sup> a conveyance to another person inconsistent with the former conveyance,<sup>30</sup> or a notice to his grantee of

<sup>24</sup> *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Law v. Long*, 41 Ind. 586; *Hoyt v. Swar*, 53 Ill. 134; *Walsh v. Young*, 110 Mass. 396; *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629; *Epps v. Flowers*, 101 N. C. 158; *Greenwood v. Coleman*, 34 Ala. 150; *Hughes v. Watson*, 10 Ohio, 127.

<sup>25</sup> *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Rogers v. Hurd*, 4 Day (Conn.) 57. See *Irvine v. Irvine*, 9 Wall. (U. S.) 617.

<sup>26</sup> *Drake's Lessee v. Ramsay*, 5 Ohio, 252; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *State v. Plaisted*, 43 N. H. 413; *Long v. Williams*, 74 Ind. 115.

<sup>27</sup> *Inhabitants of Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233.

<sup>28</sup> *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569; *Chadbourne v. Rackliff*, 30 Me. 354; *Cole v. Pennoyer*, 14 Ill. 158; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381.

<sup>29</sup> *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Tunison v. Chamblin*, 88 Ill. 378; *Gillespie v. Bailey*, 12 W. Va. 70, 89, 29 Am. Rep. 445.

<sup>30</sup> *Tucker's Lessee v. Moreland*, 10 Pet. (U. S.) 58; *Corbett v. Spencer*, 63 Mich. 731; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *State v. Plaisted*, 43 N. H. 413; note to *Craig v. Van Bebber*, 18 Am. St. Rep. 665.

an intention to disaffirm the conveyance.<sup>31</sup> The conveyance cannot be avoided by the infant until after he arrives at the age of majority.<sup>32</sup> If he dies before either repudiating or affirming the conveyance, his heirs or personal representatives, whichever would be otherwise entitled to the land, may repudiate it.<sup>33</sup>

If the infant, after arriving at majority, affirms the conveyance by unequivocally recognizing it as valid, he is thereafter precluded from repudiating it.<sup>34</sup> In some states, though not in all, the fact that he fails to repudiate the conveyance within a reasonable time after arriving at majority is regarded as an affirmance;<sup>35</sup> and, in any state, if he stands

<sup>31</sup> *Scranton v. Stewart*, 52 Ind. 68; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38.

<sup>32</sup> *Welch v. Bunce*, 83 Ind. 382, *Finch's Cas.* 982; *Sims v. Everhardt*, 102 U. S. 300; *Tucker's Lessee v. Moreland*, 10 Pet. (U. S.) 75; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Emmons v. Murray*, 16 N. H. 385; *Shipley v. Bunn*, 125 Mo. 445; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Zouch v. Parsons*, 3 Burrows, 1794.

<sup>33</sup> *Gillenwaters v. Campbell*, 142 Ind. 529; *Austin v. Trustees of Charlestown Female Seminary*, 8 Metc. (Mass.) 196, 41 Am. Dec. 497; *Bozeman v. Browning*, 31 Ark. 364; *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221.

<sup>34</sup> *Emmons v. Murray*, 16 N. H. 385; *Allen v. Poole*, 54 Miss. 323; *Keegan v. Cox*, 116 Mass. 289; *Lacy v. Pixler*, 120 Mo. 383; *Davidson v. Young*, 38 Ill. 145; *Cox v. McGowan*, 116 N. C. 131.

<sup>35</sup> *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434; *Amey v. Cockey*, 73 Md. 297; *Brantley v. Wolf*, 60 Miss. 420; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Ward v. Laverty*, 19 Neb. 429; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Ferguson v. Houston, E. & W. T. Ry. Co.*, 73 Tex. 344; *Thormaehlen v. Kaepfel*, 86 Wis. 378; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 47 Am. Rep. 798. See *Dolph v. Hand*, 156 Pa. St. 91. Contra, *Sims v. Everhardt*, 102 U. S. 300; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *McMurray v. McMurray*, 66 N. Y. 175; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381; *Donovan v. Ward*, 100 Mich. 601; *Emmons v. Murray*, 16 N. H. 385. See note to *Craig v. Van Bebber*,



by, after arriving at majority, without asserting any claim, though knowing that his grantee or another is expending money on the supposition that the conveyance is valid, he would be estopped to thereafter deny its validity.<sup>36</sup> In a few states there is a statutory provision requiring the repudiation to take place within a reasonable time.<sup>37</sup> In no state could he assert any right to the land as against one who had been in possession thereof under his conveyance for the statutory period of limitation after he became *sui juris*.<sup>38</sup> If one is under the disability of coverture at the time of her arrival at the age of majority, she cannot, by her failure, during the continuance of her coverture, to avoid a conveyance made by her during infancy, be regarded as affirming it.<sup>39</sup>

In order that one may avoid a conveyance made during infancy, it is not necessary that he return the consideration received by him unless he still has the specific consideration received, as in the case of an unpaid purchase-money note.<sup>40</sup>

18 Am. St. Rep. 675, for full citation and discussion of the cases upon this point.

<sup>36</sup> Logan v. Gardner, 136 Pa. St. 588, 20 Am. St. Rep. 939; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; Lacy v. Pixler, 120 Mo. 383; Dolph v. Hand, 156 Pa. St. 91; Wheaton v. East, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; Sims v. Bardoner, 86 Ind. 87, 44 Am. Rep. 263. Compare Davidson v. Young, 38 Ill. 145.

<sup>37</sup> 1 Stimson's Am. St. Law, § 6602(C).

<sup>38</sup> Wells v. Seixas (C. C.) 24 Fed. 82; Bozeman v. Browning, 31 Ark. 364; Donovan v. Ward, 100 Mich. 601; Wallace v. Latham, 52 Miss. 291; Hughes v. Watson, 10 Ohio, 127; Sims v. Bardoner, 86 Ind. 87, 44 Am. Rep. 263.

<sup>39</sup> Sims v. Everhardt, 102 U. S. 300; Stull v. Harris, 51 Ark. 294; Wilson v. Branch, 77 Va. 65, 46 Am. Rep. 709; Sims v. Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Epps v. Flowers, 101 N. C. 158.

<sup>40</sup> Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233, Finch's Cas. 984; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Brantley v. Wolf, 60 Miss. 420; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569; Englebert v. Troxell, 40 Neb. 195, 42 Am. St. Rep. 665; Stull v. Harris, 51 Ark. 294. But see, to the contrary, Bingham v. Barley, 55 Tex. 281,

A conveyance to an infant is valid unless repudiated by him within a reasonable time after his arrival at majority.<sup>41</sup>

— Transfer by will.

The English Statute of Wills, with its explanatory act passed two years later, excluded persons under twenty-one years of age from those authorized to transfer lands by will, though males over fourteen and females over twelve could at that time transfer personalty.<sup>42</sup> In this country, the statutes of the various states are not uniform in regard to the age at which one may make a will, a distinction sometimes existing between wills of real and personal property in this regard, and sometimes not, and the required age of a female being in some states less than that of a male. In a majority of the states, however, a testator of either sex must be twenty-one years of age.<sup>43</sup>

§ 503. Persons mentally incapacitated.

In determining whether a person has the mental capacity to make a valid and binding conveyance, the only question is whether he is able to clearly understand the nature and consequences of the conveyance, and the fact that his mental powers are impaired, or that he is subject to a delusion, if this is not such as to influence him in making the convey-

40 Am. Rep. 801; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209.

<sup>41</sup> *Cecil v. Salisbury*, 2 Vern. 224; *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; *Boody v. McKenney*, 23 Me. 517; *Robbins v. Eaton*, 10 N. H. 561; *Henry v. Root*, 33 N. Y. 526; *Baker v. Kennett*, 54 Mo. 82; *Johnston v. Furnier*, 69 Pa. St. 449; *Ellis v. Alford*, 64 Miss. 8.

<sup>42</sup> 1 Jarman, Wills, 33, and note.

<sup>43</sup> 1 Stimson's Am. St. Law, § 2602; 1 Woerner, Administration, § 20.

ance, does not impair its validity.<sup>44</sup> One who, at the time of making a conveyance, is unable to understand its nature and effect by reason of intoxication, stands, it seems, upon the same footing in this regard as one who is otherwise mentally incapacitated.<sup>45</sup>

The authorities are not in accord as to the effect of a conveyance *inter vivos* by a person mentally incapacitated. According to some decisions, such a conveyance is, like that of an infant, merely voidable,<sup>46</sup> unless a guardian has been appointed for the grantor and his property after judicial inquiry into his sanity, in which case the conveyance is regarded as absolutely void.<sup>47</sup> By other decisions, a convey-

<sup>44</sup> Buswell, *Insanity*, §§ 390-393; *Burgess v. Pollock*, 53 Iowa, 273, 36 Am. Rep. 218; *Doe d. Guest v. Beeson*, 2 Houst. (Del.) 246; *Lindsey v. Lindsey*, 50 Ill. 79, 99 Am. Dec. 489; *Blakeley v. Blakeley*, 33 N. J. Eq. 502; *Stewart v. Flint*, 59 Vt. 144; *Whittaker v. Southwest Virginia Improvement Co.*, 34 W. Va. 217; *Dennett v. Dennett*, 44 N. H. 531.

<sup>45</sup> See Buswell, *Insanity*, § 393; *Shackelton v. Sebree*, 86 Ill. 616; *French's Heirs v. French*, 8 Ohio, 214, 31 Am. Dec. 441; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Dulany v. Green*, 4 Har. (Del.) 285; *Warnock v. Campbell*, 25 N. J. Eq. 485; *Harbison v. Lemon*, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376.

<sup>46</sup> *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744, *Finch's Cas.* 994; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716; *Hovey v. Hobson*, 53 Me. 451; *Riley v. Carter*, 76 Md. 581, 35 Am. St. Rep. 443; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 236; *Langley v. Langley*, 45 Ark. 392; *Nichol v. Thomas*, 53 Ind. 42; 2 Bl. Comm. 291; 2 Kent's Comm. 451. But even when this view is adopted, a conveyance by a married woman, under a statute requiring the joinder of her husband, is absolutely void if he is insane when he executes it. *Leggate v. Clark*, 111 Mass. 308.

<sup>47</sup> *Wait v. Maxwell*, 5 Pick. (Mass.) 217; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Thorpe v. Hanscom*, 64 Minn. 201; *New England Loan & Trust Co. v. Spitler*, 54 Kan. 560; *Imhoff v. Witmer's Adm'r*, 31 Pa. St. 243; *Griswold v. Butler*, 3 Conn. 227; *Elston v. Jasper*, 45 Tex. 409. But see *Hunt v. Hunt*, 13 N. J. Eq. 161.

An adjudication merely that the grantor is insane, and a fit subject for custody in a hospital for the insane, does not have this effect.

ance by one of unsound mind is absolutely void,<sup>48</sup> the logical result of which view is that it can be attacked not only by the grantor and persons in privity with him, but also by third persons generally, and, further, that it can be ratified by the grantor only by making another conveyance after his restoration to sanity.

In states where the conveyance is regarded as voidable only, it may be avoided either by the grantor after he has reacquired his mental capacity, or by his heirs or personal representatives after his death.<sup>49</sup> By ratifying the conveyance when mentally capable of acting, provided it is not regarded as absolutely void, the grantor precludes any subsequent avoidance thereof.<sup>50</sup>

According to perhaps the weight of authority, one cannot assert the invalidity of his conveyance by reason of mental incapacity, as against his grantee who took the conveyance in

*Dewey v. Allgire*, 37 Neb. 6, 40 Am. St. Rep. 468; *Knox v. Haug*, 48 Minn. 58; *Leggate v. Clark*, 111 Mass. 308.

It has been decided that, if the guardianship has been in effect abandoned, the grantor having recovered his sanity, the conveyance will be supported, though the guardian has not been discharged by judicial action. *Thorpe v. Hanscom*, 64 Minn. 201; *Elston v. Jasper*, 45 Tex. 409.

<sup>48</sup> *Sullivan v. Flynn*, 20 D. C. 396; *Elder v. Schumacher*, 18 Colo. 433; *Farley v. Parker*, 6 Or. 105; *German Sav. & Loan Soc. v. De Lashmutt (C. C.)* 67 Fed. 399; *Van Deusen v. Sweet*, 51 N. Y. 378; *In re Desilver's Estate*, 5 Rawle (Pa.) 111; *Dexter v. Hall*, 15 Wall. (U. S.) 9 (power of attorney); *Thompson v. Leach*, Comb. 468, Carth. 435. A distinction has been taken in this respect between a feoffment and a conveyance by deed, the former being stated to be voidable merely, and the latter to be absolutely void. See the three cases last cited.

<sup>49</sup> 2 Bl. Comm. 292; *Langley v. Langley*, 45 Ark. 392; *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744, *Finch's Cas.* 994; *Brown v. Freed*, 43 Ind. 253; *Turner v. Rusk*, 53 Md. 65; *Valpey v. Rea*, 130 Mass. 384; *Judge of Probate v. Stone*, 44 N. H. 593.

<sup>50</sup> *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744, *Finch's Cas.* 944; *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 434; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716.



the reasonable belief that the grantor was mentally capable, unless such grantee is placed *in statu quo* by a return of the consideration.<sup>51</sup> And, on the same theory, it has been held that the conveyance cannot be avoided as against a *bona fide* purchaser from the grantee for value.<sup>52</sup> By other authorities, however, the conveyance may be avoided, although the grantee acted in perfect good faith,<sup>53</sup> and even as against a *bona fide* purchaser from the grantee for value,<sup>54</sup> and the right to avoid the conveyance is not regarded as dependent on the return of the consideration.<sup>55</sup>

A conveyance or devise may be made to a person wanting in mental capacity, and the title is thereby vested in him subject to his right, upon regaining his faculties, to refuse to accept it.<sup>56</sup>

<sup>51</sup> Scanlan v. Cobb, 85 Ill. 296; Odom v. Riddick, 104 N. C. 515; Boyer v. Berryman, 123 Ind. 451; Rusk v. Fenton, 14 Bush (Ky.) 490, 29 Am. Rep. 413; Behrens v. McKenzie, 23 Iowa, 333; Gribben v. Maxwell, 34 Kan. 8, 55 Am. Rep. 233; Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; Eaton v. Eaton, 37 N. J. Law, 108, 18 Am. Rep. 716. And see Crawford v. Scovell, 94 Pa. St. 48, 39 Am. Rep. 766. Such seems to be the English rule. Molton v. Camroux, 2 Exch. 487, 4 Exch. 17; Elliot v. Ince, 7 De Gex, M. & G. 475; Wood Renton, Lunacy, 13.

<sup>52</sup> Odom v. Riddick, 104 N. C. 515. See New England Loan & Trust Co. v. Spitler, 54 Kan. 560.

<sup>53</sup> Sullivan v. Flynn, 20 D. C. 396; Rogers v. Walker, 6 Pa. St. 371, 47 Am. Dec. 470; Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468.

<sup>54</sup> German Sav. & Loan Soc. v. De Lashmutt (C. C.) 67 Fed. 399; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Rogers v. Blackwell, 49 Mich. 192; Hull v. Louth, 109 Ind. 315, 58 Am. Rep. 405; Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468; Valentine v. Lunt, 51 Hun (N. Y.) 544.

<sup>55</sup> Nichol v. Thomas, 53 Ind. 42; Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Henry v. Fine, 23 Ark. 417; Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705.

<sup>56</sup> Co. Litt. § 2b; 2 Bl. Comm. 291; Concord Bank v. Bellis, 10 Cush. (Mass.) 276; Campbell v. Kuhn, 45 Mich. 513, 40 Am. Rep. 479.



— Testamentary capacity.

The mental capacity necessary for the making of a will has been the subject of an immense number of decisions, in which the subject is considered with reference to the facts of the particular case. The rule now quite generally approved in this respect is to the effect that it is sufficient if the testator knows the extent and value of his property, the number and names of the persons who are the proper objects of his bounty, their deserts as measured by their conduct towards him, their capacities and necessities, and he has sufficient memory to retain these facts in his mind until the execution of the will. Accordingly, the fact that testator was subject to insane delusions does not necessarily show incapacity to make a will. Nor is a will invalid because, at the time of making it, the testator was under guardianship as an insane person, though this fact usually, if not always, raises a presumption of insanity.<sup>57</sup>

§ 504. Corporations.

A corporation has, in the absence of an express prohibition, the same power as a private individual to transfer its land, as well as its other property, provided only that the transfer is for an object consistent with the purposes of its creation.<sup>58</sup>

At common law, a corporation has power to acquire such land as may be necessary for or reasonably incidental to

<sup>57</sup> 1 Woerner, Administration, § 23 et seq.; Page, Wills, § 97 et seq.; Bigelow, Wills, 72.

<sup>58</sup> 2 Kent's Comm. 281; 1 Clark & M. Corp. § 152; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280, Finch's Cas. 998; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252; State v. Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166; Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Levering v. Bimel, 146 Ind. 545; Aurora Agricultural & Horticultural Soc. v. Paddock, 80 Ill. 264, Finch's Cas. 1000.

carrying out the purposes of its creation.<sup>59</sup> This principle is, in most of the states, confirmed by statutory provision, while in a few states there seems to be no limit upon the power to acquire land.<sup>60</sup>

The common-law right of a corporation to acquire land was greatly circumscribed by the enactment of the various statutes of "mortmain," which, while directed chiefly at ecclesiastical bodies, applied in terms to all corporations, and prohibited their acquisition of land without license from the crown, and, during certain periods, from the mesne lord also.<sup>61</sup> These statutes seem to have been adopted in but one state.<sup>62</sup> There are, however, in a number of states, special statutory restrictions upon the power of religious corporations to acquire and hold land, and the United States statutes contain a provision to this effect applicable to corporations in any of the territories.<sup>63</sup> In a few states, moreover, a testamentary provision in favor of a religious or charitable body is invalid if in excess of a certain amount, or if the will is not executed a certain length of time before the testator's death.<sup>64</sup>

Restrictions as to the quantity of land which a corporation may acquire, or the purposes for which it may acquire the land, do not usually invalidate a transfer to the corporation in violation thereof, so as to permit the transfer to be questioned by any private person, but the state only may assert the illegality of the transfer, and consequently, if the state

<sup>59</sup> 1 Bl. Comm. 478; 2 Kent's Comm. 281; 1 Clark & M. Corp. §§ 132, 138.

<sup>60</sup> 2 Stimson's Am. St. Law, § 8204.

<sup>61</sup> See, as to these statutes, 2 Bl. Comm. 268; 2 Kent's Comm. 282.

<sup>62</sup> Pennsylvania. See *Leazure v. Hillegas*, 7 Serg. & R. 313; 2 Kent's Comm. 283.

<sup>63</sup> 5 Thompson, Corp. § 5774. See Rev. St. U. S. § 1890; *In re McGraw's Estate*, 111 N. Y. 66; *Church Extension of M. E. Church v. Smith*, 56 Md. 392.

<sup>64</sup> 1 Stimson's Am. St. Law, § 2618.

fails so to do, the corporation may retransfer the land to another.<sup>65</sup> Occasionally, however, it has been decided that a transfer by will to a corporation stands on a different footing in this respect from a transfer *inter vivos*, and that such a transfer may be attacked by the heirs of the testator.<sup>66</sup>

## § 505. Aliens.

At common law, an alien might take land by purchase,—that is, by transfer *inter vivos* or devise, and hold the same until a forfeiture in favor of the state was enforced by a proceeding of “office found.”<sup>67</sup>

An alien could not, at common law, acquire any estate in land by operation of law, as by descent,<sup>68</sup> or under the law in relation to dower and curtesy,<sup>69</sup> for the reason, it

<sup>65</sup> 1 Clark & M. Corp. § 228 et seq.; 5 Thompson, Corp. § 5795 et seq.; Jones v. Habersham, 107 U. S. 174; Farrington v. Putnam, 90 Me. 405; Hanson v. Little Sisters of Poor of Baltimore, 79 Md. 434; Fayette Land Co. v. Louisville & N. R. Co., 93 Va. 274; Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931. But see Wood v. Hammond, 16 R. I. 98.

<sup>66</sup> In re McGraw's Estate, 111 N. Y. 66; House of Mercy of New York v. Davidson, 90 Tex. 529; Gromie v. Home Society, 3 Bush (Ky.) 865; Wood v. Hammond, 16 R. I. 98. See De Camp v. Dobbins, 31 N. J. Eq. 690; Starkweather v. American Bible Soc., 72 Ill. 50.

<sup>67</sup> Co. Litt. 2b, 42b; 1 Bl. Comm. 371; 2 Bl. Comm. 249, 274, 293; 3 Bl. Comm. 258; 2 Kent's Comm. 54; Doe d. Gouverneur's Heirs v. Robertson, 11 Wheat. (U. S.) 332; Carlow v. Aultman, 28 Neb. 672; Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344, Finch's Cas. 980; Quigley v. Birdseye, 11 Mont. 439; Wright v. Saddler, 20 N. Y. 320; Sands v. Lynham, 27 Grat. (Va.) 291, 21 Am. Rep. 348; Bennett v. Hibbert, 88 Iowa, 154; Doe d. Rouche v. Williamson, 25 N. C. 141. Compare Wunderle v. Wunderle, 144 Ill. 40.

<sup>68</sup> Litt. § 198; Co. Litt. 42b; 2 Bl. Comm. 249, 293, and Chitty's note; Orr v. Hodgson, 4 Wheat. (U. S.) 453; Crosgrove v. Crosgrove, 69 Conn. 416; Montgomery v. Dorion, 7 N. H. 475; Utassy v. Giedinghagen, 132 Mo. 53; Jackson's Lessee v. Burns, 3 Binn. (Pa.) 75; Barzizas v. Hopkins, 2 Rand. (Va.) 276.

<sup>69</sup> Priest v. Cummings, 20 Wend. (N. Y.) 338, Finch's Cas. 692; Alsberry v. Hawkins, 9 Dana (Ky.) 177, 33 Am. Dec. 546; Buchanan v. Deshon, 1 Har. & G. (Md.) 280; Foss v. Crisp, 20 Pick. (Mass.) 121, Finch's Cas. 645; Sutliff v. Forgey, 1 Cow. (N. Y.) 89; Quinn v. (1158)

is said, that the law will not do a vain thing by giving to a man that which he cannot keep. Furthermore, an alien was not regarded as having heritable blood, and hence, though he died seised or possessed of land, it necessarily escheated to the state for lack of heirs;<sup>70</sup> nor could one claim land by descent from a citizen if his relationship could be traced only through an alien.<sup>71</sup> On the same principle, the native wife

Ladd, 37 Or. 261; Reese v. Waters, 4 Watts & S. (Pa.) 145; Bennett v. Harms, 51 Wis. 251.

<sup>70</sup> Slater v. Nason, 15 Pick. (Mass.) 345; Farrar v. Dean, 24 Mo. 16; Wunderle v. Wunderle, 144 Ill. 40; Montgomery v. Dorion, 7 N. H. 475; Rubeck v. Gardner, 7 Watts (Pa.) 455; Barrett v. Kelly, 31 Tex. 476; Sands v. Lynham, 27 Grat. (Va.) 291, 21 Am. Rep. 348; Fry v. Smith, 2 Dana (Ky.) 38; Jackson v. Adams, 7 Wend. (N. Y.) 368; Fairfax's Devisee v. Hunter's Lessee, 7 Cranch (U. S.) 603; Co. Litt. 2b; 2 Kent's Comm. 54.

<sup>71</sup> Levy's Lessee v. McCartee, 6 Pet. (U. S.) 102; Beavan v. Went, 155 Ill. 592; Jackson v. Green, 7 Wend. (N. Y.) 333; McLean v. Swanton, 13 N. Y. 535; Furenes v. Mickelson, 86 Iowa, 508; Meier v. Lee, 106 Iowa, 303. This principle has never been recognized in Connecticut. Campbell's Appeal from Probate, 64 Conn. 277.

It has been decided that a brother traces descent from his brother directly, and not through their father, and that hence the alienage of the father will not affect the right of one brother to inherit from the other if both are citizens. Collingwood v. Pays, Sid. 193, 1 Vent. 413, Bridg. 414. And so grandsons of one grandfather have been held to inherit directly, so that the alienage of the grandfather is immaterial. McGregor v. Comstock, 3 N. Y. 408. On the other hand, it has been held that the alienage of the claimant's father prevents inheritance from a paternal uncle or great uncle. Jackson v. Fitz Simmons, 10 Wend. (N. Y.) 10; Furenes v. Mickelson, 86 Iowa, 508. See Levy's Lessee v. McCartee, 6 Pet. (U. S.) 102. The distinctions asserted in this respect are, as remarked by Chancellor Kent (2 Comm. 55), "very subtle."

By 11 & 12 Wm. III. c. 6, the disability to inherit by reason of the alienage of one through whom descent is claimed was removed, and a similar statute has, as stated in a subsequent paragraph of the text, been adopted in a number of states. But these statutes do not enable one to claim by descent if the alien through whom he claims is still alive. McCreery's Lessee v. Somerville, 9 Wheat. (U. S.) 354; McLean v. Swanton, 13 N. Y. 535.

or husband of an alien could not claim dower or curtesy.<sup>72</sup> In case of the death of a citizen, whose next of kin are aliens, the fact of such alienage does not cause the land to pass to the state, but they are simply ignored, and the others related in the same degree, or those related in the next degree, take, to the exclusion of such aliens.<sup>73</sup>

In this country the common-law restrictions upon the right of aliens to acquire and hold lands and transfer have been very considerably relaxed; in most states they having the same rights in this regard as native citizens, and in some the prohibition extending only to nonresident aliens.<sup>74</sup> Moreover, in many cases, the right of an alien in a particular case to acquire and retain land has been upheld by force of treaty provisions between the United States government and the country to which the alien owes allegiance.<sup>75</sup> So far as the statutes of any state may prohibit the acquisition or holding of lands by an alien, they have usually been construed as operating, like the common-law prohibition, differently in respect to rights acquired by descent and those acquired by purchase.<sup>76</sup> In a number of states, moreover, it is provided that no title to real estate shall be invalid on account of the alienage of a former owner, and in many it is declared that, when one claiming by descent is otherwise entitled, the fact that the father, mother, or other ancestor through whom the descent is derived was an alien shall not bar the claim.<sup>77</sup>

<sup>72</sup> *Congregational Church at Mobile v. Morris*, 8 Ala. 182; *Coxe v. Gulick*, 10 N. J. Law, 328.

<sup>73</sup> *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *Jackson v. Jackson*, 7 Johns. (N. Y.) 214; *Wunderle v. Wunderle*, 144 Ill. 40; *Hardy v. De Leon*, 5 Tex. 211; *McKellar v. McKellar*, 1 Speer (S. C.) 536; 2 Kent's Comm. 56.

<sup>74</sup> 1 Stimson's Am. St. Law, §§ 6010-6015.

<sup>75</sup> See 2 Am. & Eng. Enc. Law (2d Ed.) 245.

<sup>76</sup> See cases cited *supra*, notes 61-71.

<sup>77</sup> 1 Stimson's Am. St. Law, § 6016.



## § 505a. Criminals.

At common law, while one attainted of treason and felony could not, by alienation of any estate vested in him, deprive the crown of the right to enforce a forfeiture, he could, it seems, make and receive transfers subject to such right in the crown.<sup>78</sup> That a conviction of crime does not affect the capacity of a person to take or transfer lands seems true *a fortiori* in this country, where forfeiture for crime is not generally recognized.<sup>79</sup> A statutory provision, however, suspending the civil rights of one sentenced to life imprisonment, would seem to destroy his power of making a transfer *inter vivos*.<sup>80</sup>

The question has arisen in a number of cases in this country whether one who murders another is entitled to take by descent or devise from the latter. The cases have more generally taken the view that, in such case, the devisee or heir is entitled to take as in any other case, and that a contrary view would involve a forfeiture of property for crime, such as is not recognized in this country.<sup>81</sup> These decisions, though no doubt correct in so far as they decide that the legal title to the property of the deceased passes to the murderer, are probably incorrect in that they fail to apply or recognize the principle that a court of equity will intervene to compel one who acquires property by the commission of a wrong to hold it as a trustee *ex maleficio* for the

<sup>78</sup> Sheppard's Touchstone, 232; Doe d. Griffith v. Pritchard, 5 Barn. & Adol. 765; Avery v. Everett, 110 N. Y. 317, 6 Am. St. Rep. 368.

<sup>79</sup> Avery v. Everett, 110 N. Y. 317, 6 Am. St. Rep. 368; Rankin's Heirs v. Rankin's Ex'rs, 6 T. B. Mon. (Ky.) 531.

<sup>80</sup> Williams v. Shackelford, 97 Mo. 322. And see *In re Nerac's Estate*, 35 Cal. 396, 95 Am. Dec. 111. But see, to the contrary, Avery v. Everett, 110 N. Y. 317, 333, 6 Am. St. Rep. 368.

<sup>81</sup> Shellenberger v. Ransom, 41 Neb. 631; Owens v. Owens, 100 N. C. 240; Carpenter's Estate, 170 Pa. St. 203; Deem v. Millikin, 6 Ohio Cir. Ct. R. 357.

persons rightfully entitled,<sup>82</sup>—a view which has been approved by the highest court of one state.<sup>83</sup>

<sup>82</sup> See the exhaustive discussion of the question by James Barr Ames, Esq., in 36 Am. Law Reg. 225. See, also, 30 Am. Law Rev. 130; 4 Harv. Law Rev. 394; 8 Harv. Law Rev. 170.

<sup>83</sup> *Ellerson v. Westcott*, 148 N. Y. 149, commenting on *Riggs v. Palmer*, 115 N. Y. 506.

## PART VI.

### LIENS.

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#### CHAPTER XXXV.

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## I. THE NATURE AND ESSENTIALS OF A MORTGAGE.

A mortgage on land is a lien on an interest in the land, created by a formal agreement, or by a transfer of such interest, in order to secure the payment of money or the performance of some other act.<sup>1</sup> The modern mortgage is an equitable development of the common-law estate on condition subsequent.

<sup>1</sup> The term "mortgage" is also applied to the formal instrument by which the mortgage lien is created.

In some states, a mortgagee has not only a lien, but also the legal title to the land, which he may utilize as against the mortgagor to render his security more effective. The mortgagor is, however, for most purposes, the owner of the land.

Any interests in land may be mortgaged, including crops growing or to be grown thereon, and equity recognizes a mortgage of things to be acquired in the future.

A mortgage is usually created by an instrument in form a conveyance on condition subsequent, and a formal conveyance is necessary in order to vest the legal title in the mortgagee. A mortgage is also created by an instrument in form an absolute conveyance, if this can be shown to be intended for purposes of security only.

A mortgage may be given to secure advances to be made in the future, but, as a general rule, an advance, when made, is not secured by the mortgage as against an intervening incumbrance known to the mortgagee at the time of making the advance.

Even after a default in the payment to secure which the mortgage was given, the mortgagor may, by making such payment, "redeem" the land from the lien. This right cannot be defeated by agreement, and continues until "foreclosure."

#### § 506. Historical development.

Transfers of land as security for a debt assumed, in early times in England, various forms, among which was the *mortuum vadium*, from which has been derived the term "mortgage." The *mortuum vadium* was so called, it seems, owing to the fact that, upon its creation, the pledgee became entitled to the rents and profits of the land, and consequently the land was "dead" to the debtor, while, by the form of pledge known as the *vivum vadium*, the profits of the land were applied on the debt. Both these forms of security eventually gave place to what is known as the "common-law mortgage," consisting of a feoffment subject to a condition that, on payment by



the feoffor (the debtor) of a sum named, at a certain time, he might re-enter, thereby terminating the feoffee's estate.<sup>2</sup>

A strict compliance with the condition of a common-law mortgage was insisted upon by the courts of law, which refused to consider that the conveyance was intended merely as security for a debt, and they treated the estate of the mortgagee as indefeasible if the condition was not promptly performed by the mortgagor. Consequently, land was often forfeited for a debt much less than its value.<sup>3</sup> The court of chancery, however, quite early showed a disposition to relieve against this hardship, and about the middle of the seventeenth century it became the settled doctrine of that court that the debtor, by paying the debt even after it became due, could recover the ownership of the land,—that is, could “redeem,”—his right so to do being known as the “equity of redemption.”<sup>4</sup>

Since, unless some restriction in respect of time was placed on this right of redemption, the creditor to whom the mortgage was made, known as the “mortgagee,” might be forever deprived of the right to recover his money, the court of chancery allowed this right of redemption to be put an end to by a decree of “foreclosure,” granted upon the bringing of proceedings for the purpose, the right of redemption being

<sup>2</sup> Litt. §§ 332-344. See Digby, *Hist. Real Prop.* 282; Coote, *Mortgages*, 1-3.

The early “gage” of land had much more the characteristics of the modern mortgage, as developed in equity, than the common-law mortgage of the time of Littleton. See Glanville, bk. 10, c. 6; 2 Pollock & Maitland *Hist. Eng. Law*, 117-123; *The Story of Mortgage Law*, by H. W. Chaplin, Esq., 4 *Harv. Law Rev.* 1.

<sup>3</sup> Litt. §§ 332, 337; Coote, *Mortgages*, 13; 4 *Kent's Comm.* 140; Williams, *Real Prop.* (18th Ed.) 510.

<sup>4</sup> *How v. Viguers*, 1 Rep. Ch. 32; *Emanuel College v. Evans*, 1 Rep. Ch. 18, *Kirchwey's Cas.* 704; *Manning v. Burges*, 1 Ch. Cas. 29, *Kirchwey's Cas.* 704; 1 Spence, *Equitable Jurisdiction*. 603; 4 *Kent's Comm.* 158; Williams, *Real Prop.* (18th Ed.) 510.

thereby cut off or "foreclosed," unless the debt was paid by a time named in the decree.<sup>5</sup>

Somewhat later, chancery, regarding the real purpose of the mortgage conveyance, adopted the view that the mortgagor, in spite of his conveyance by way of mortgage, was still the owner of the property, with all the rights of an owner, so far as these were consistent with the security of the mortgagee, and that the latter had merely a charge or lien on the land to secure his debt.<sup>6</sup> But after the position of the mortgagor as owner was thus established in equity, the term "equity of redemption," which had previously and most appropriately been applied to his right to redeem, was applied, rather inappropriately, it would seem, to this entirely distinct right of ownership, and at the present day the term, though used in both senses, more frequently describes the interest of the mortgagor in the mortgaged land than his right to redeem after default.<sup>7</sup>

### § 507. Legal and equitable theories.

While, as just stated, courts of equity have always regarded the mortgagee as having a lien merely, the common-law view that, by the creation of the mortgage, the legal title to the land is transferred to the mortgagee, as in the case of any

<sup>5</sup> 2 Cruise, Dig. tit. 15, c. 1, § 13; 4 Kent's Comm. 181; 2 Bl. Comm. 159. See post, § 548 et seq.

At the present day, as will appear later, the decree, instead of giving the property to the mortgagee, provides for its sale, and payment of his debt out of the proceeds, or there is a sale without decree.

<sup>6</sup> Casborne v. Scarfe, 1 Atk. 603. See 4 Kent's Comm. 160.

<sup>7</sup> The distinction between the mortgagor's right of ownership in the land before default, and his right, by going into equity, to redeem the land even after default and the consequent loss of the legal ownership, is, it would seem, self-evident, but the courts, by applying the same term to the two distinct rights, have continued to obscure the nature of each. See, e. g., post, note 213.

other conveyance on condition subsequent, is still retained in courts of law in England and some states in this country. This difference of view on the part of the courts of equity and law does not involve any conflict between the two jurisdictions, since courts of law recognize, though they do not usually enforce, the rights given to the mortgagor by courts of equity, while these latter assent to the enforcement by courts of law, so far as necessary for the protection of the mortgagee, of his legal rights as owner of the land.<sup>8</sup> This view, thus adopted in some states, that the legal title is in the mortgagee, at least for certain purposes, may conveniently be termed the "legal theory" of a mortgage.<sup>9</sup> In other states the view that the mortgagee has the legal title is entirely superseded, both at law and in equity, by the view which has always prevailed in equity, that he has merely a lien for the security of his debt. In a number of states, there is a statutory provision confirmatory of this "equitable theory" of a mortgage.<sup>10</sup>

<sup>8</sup> 4 Kent's Comm. 160; 3 Pomeroy, Eq. Jur. § 1184.

<sup>9</sup> The states in which this theory is adopted are Alabama, Arkansas, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia. 1 Jones, Mortgages (5th Ed.) §§ 17-59; 3 Pomeroy, Eq. Jur. (2d Ed.) §§ 1186-1191. See *Welsh v. Phillips*, 54 Ala. 309, 25 Am. Rep. 679; *Kannady v. McCarron*, 18 Ark. 166; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331; *Blaney v. Bearce*, 2 Me. 132; *Jamieson v. Bruce*, 6 Gill & J. (Md.) 72, 26 Am. Dec. 557; *Ewer v. Hobbs*, 5 Metc. (Mass.) 1; *Howard v. Robinson*, 5 Cush. (Mass.) 119; *Hobart v. Sanborn*, 13 N. H. 226, 38 Am. Dec. 483; *Tryon v. Munson*, 77 Pa. St. 250, *Finch's Cas.* 538; *Simmons v. Brown*, 7 R. I. 427; *Faulkner's Adm'x v. Brockebrough*, 4 Rand. (Va.) 245.

<sup>10</sup> The states in which this view prevails are California, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, North Dakota, Oregon, South Carolina, South Dakota, Texas, Wisconsin, Utah, and Washington. 1 Jones, Mortgages, §§ 17-59; 3 Pomeroy, Eq. Jur. (1168)

Even in those states which have adopted the English or legal theory of a mortgage, the courts have not consistently followed it out to all its logical consequences; a tendency to regard the mortgage according to its real nature as a mere security being constantly at work, even in courts of law, a tendency which has been increased and strengthened by the various statutes admitting equitable defenses in legal actions, or otherwise obscuring the line between equity and law.<sup>11</sup> The extension of the view that a mortgage is merely a lien marks a distinct advance in legal ideas, and it is to be expected that, with the passage of time, the crude conception of an estate on condition in the mortgagee will entirely disappear.<sup>12</sup>

(2d Ed.) §§ 1186-1191. See *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *Drake v. Root*, 2 Colo. 685; *McMahon v. Russell*, 17 Fla. 698; *Burnside v. Terry*, 45 Ga. 621; *Grable v. McCulloh*, 27 Ind. 472; *Chick v. Willetts*, 2 Kan. 384; *Taliaferro v. Gay*, 78 Ky. 496; *Caruthers v. Humphrey*, 12 Mich. 270; *Adams v. Corrison*, 7 Minn. 456 (Gil. 365); *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638; *Phyfe v. Riley*, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Bredenburg v. Landrum*, 32 S. C. 215; *Wright v. Henderson*, 12 Tex. 43.

In three states (Delaware, Mississippi, and Missouri) the mortgagee has, before default, merely a lien, but after default and entry by the mortgagee, the latter has the legal title, and, as owner, may take possession, or may adopt any legal remedies to obtain possession. *Doe d. Hall v. Tunnell*, 1 Houst. (Del.) 320; *Walker's Adm'x v. Farmers' Bank*, 8 Houst. (Del.) 258; *Cooch's Lessee v. Gerry*, 3 Har. (Del.) 280; *Hill v. Robertson*, 24 Miss. 368; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Buck v. Payne*, 52 Miss. 271; *Reddick v. Gressman*, 49 Mo. 389; *Johnson v. Houston*, 47 Mo. 227; 1 Jones, Mortgages, §§ 24, 38, 39, 58.

<sup>11</sup> See 3 Pomeroy, *Eq. Jur.* § 1186. See post, § 517.

<sup>12</sup> See Holland, *Jurisprudence*, 202; Digby, *Hist. Real Prop.* 305.



**§ 508. The right of redemption.**

After the court of chancery established the doctrine that the mortgagor might redeem even after default, persons lending money on mortgage security naturally attempted to defeat the right of redemption in the mortgagor by obtaining from him a written waiver of the right, or contract not to assert it; but chancery, recognizing that such a contract was extorted from the necessities of the borrower, decided that the right of redemption constituted an integral part of every mortgage, and could not be waived or "clogged" by a provision in the mortgage or other contemporaneous agreement, and this rule, frequently expressed in the phrase, "once a mortgage, always a mortgage," has invariably been strictly enforced.<sup>13</sup> And not only is a contemporaneous agreement to this effect void, but a subsequent agreement which, without affecting the existence of the mortgage, provides that there shall be no right of redemption in case of nonpayment at maturity, is void, as depriving the mortgage of one of its essential features.<sup>14</sup>

**§ 509. Interests subject to mortgage.**

Any interest in land which may be the subject of sale,

<sup>13</sup> Howard v. Harris, 1 Vern. 190, Kirchwey's Cas. 430; Jason v. Eyres, 2 Ch. Cas. 33; Peugh v. Davis, 96 U. S. 332; Batty v. Snook, 5 Mich. 231, Kirchwey's Cas. 433; Henry v. Davis, 7 Johns. Ch. (N. Y.) 40; McCauley v. Smith, 132 N. Y. 524, Finch's Cas. 1109; Youle v. Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722; Bayley v. Bailey, 5 Gray (Mass.) 505; Johnston v. Gray, 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577; Turpie v. Lowe, 114 Ind. 37; Hyndman v. Hyndman, 19 Vt. 9, 46 Am. Dec. 171; Jackson v. Lynch, 129 Ill. 72; Stoutz v. Rouse, 84 Ala. 309; Bradbury v. Davenport, 114 Cal. 593, 55 Am. St. Rep. 92, and note. But if the mortgage is intended merely as a family settlement or provision, the right of redemption may, it has been held, be restricted. Bonham v. Newcomb, 1 Vern. 231 Kirchwey's Cas. 430, reversing Newcomb v. Bonham, 1 Vern. 7. See Coote, Mortgages, 27.

<sup>14</sup> Tennery v. Nicholson, 87 Ill. 464. See Batty v. Snook, 5 Mich. 231, Kirchwey's Cas. 432.



grant, or assignment may be mortgaged.<sup>15</sup> Accordingly, there may be a mortgage of a rent,<sup>16</sup> an estate in expectancy,<sup>17</sup> an estate tail,<sup>18</sup> an estate for life,<sup>19</sup> including a widow's dower estate,<sup>20</sup> and an estate for years.<sup>21</sup> A mortgagee's interest may itself be mortgaged, whatever theory be held as to the character of such interest.<sup>22</sup> An heir or devisee may mortgage his interest in the estate of the deceased, subject to the payment of the latter's debts.<sup>23</sup>

A mortgage may be made of improvements on land apart from the land itself,<sup>24</sup> and growing crops may be mortgaged by the owner of the land.<sup>25</sup>

Equitable interests, as well as legal, may be mortgaged; a usual instance of such a mortgage occurring in the case of a mortgage by the vendee under a contract of sale.<sup>26</sup> The

<sup>15</sup> 2 Story, Eq. Jur. § 1021; 4 Kent's Comm. 144; *Neligh v. Michenor*, 11 N. J. Eq. 539; *Miller v. Tipton*, 6 Blackf. (Ind.) 238; *Dorsey v. Hall*, 7 Neb. 460.

<sup>16</sup> 4 Kent's Comm. 144; *Van Rensselaer v. Dennison*, 35 N. Y. 393.

<sup>17</sup> *In re John & Cherry Streets*, 19 Wend. (N. Y.) 659; *Curtis v. Root*, 20 Ill. 518; *Flanders v. Greely*, 64 N. H. 357.

<sup>18</sup> *Hosmer v. Carter*, 68 Ill. 98.

<sup>19</sup> *Lanfair v. Lanfair*, 18 Pick. (Mass.) 304.

<sup>20</sup> *Mutual Life Ins. Co. of New York v. Shipman*, 119 N. Y. 324.

<sup>21</sup> 4 Kent's Comm. 144; *Coote*, Mortgages, c. 25; *French v. Prescott*, 61 N. H. 27; *Hagar v. Brainerd*, 44 Vt. 294.

<sup>22</sup> *Henry v. Davis*, 7 Johns. Ch. (N. Y.) 40; *Coffin v. Loring*, 9 Allen (Mass.) 154; *Johnson v. Blydenburgh*, 31 N. Y. 432; *Cutts v. York Mfg. Co.*, 18 Me. 190.

<sup>23</sup> *Flanders v. Greely*, 64 N. H. 357; *Drake v. Paige*, 127 N. Y. 562.

<sup>24</sup> *Mitchell v. Black*, 64 Me. 48; *Manwaring v. Jenison*, 61 Mich. 117; *Gooding v. Riley*, 50 N. H. 400; *Fletcher v. Kelly*, 88 Iowa, 475.

<sup>25</sup> *Briggs v. United States*, 143 U. S. 346; *Butt v. Ellett*, 19 Wall. (U. S.) 544; *Luce v. Moorehead*, 73 Iowa, 498, 5 Am. St. Rep. 695; *Cotten v. Willoughby*, 83 N. C. 75, 35 Am. Rep. 564; *Kimball v. Sattley*, 55 Vt. 285, 45 Am. Rep. 614.

<sup>26</sup> *Laughlin v. Braley*, 25 Kan. 147; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Bull*

mortgage of an equitable interest in land cannot, it would seem, in states in which the legal theory of mortgages is recognized, have the effect of passing the legal title to the mortgagee, since the mortgagor has no such title to pass.<sup>27</sup> And so in England it is recognized that a second mortgage—that is, a mortgage of the mortgagor's interest—passes no legal title to the mortgagee.<sup>28</sup> In this country, however, no such distinction between the positions of first and second mortgagees seems to be recognized.<sup>29</sup>

### — Future acquisitions.

A mere possibility of acquiring property is not the subject of mortgage, as it is not the subject of grant, and consequently one cannot, at law, mortgage interests in land to be acquired by him in the future.<sup>30</sup> In equity, however, a mortgage which in terms covers things thereafter to be acquired creates a lien or charge on such things, upon their acquisition by the mortgagor; this being an application of a general equitable principle that, if one, by contract, undertakes to create a lien or charge, the lien or charge will be regarded as actually existing, upon the acquisition by such person of the thing sought to be charged.<sup>31</sup> This principle has been frequently

v. Shepard, 7 Wis. 449; Sinclair v. Armitage, 12 N. J. Eq. 174; McPherson v. Hayward, 81 Me. 329; Davis v. Milligan, 88 Ala. 523; Attorney General v. Purmort, 5 Paige (N. Y.) 620; Holbrook v. Betton, 5 Fla. 99.

<sup>27</sup> See Jarvis v. Dutcher, 16 Wis. 307.

<sup>28</sup> Coote, Mortgages, c. 36. This is the basis of the English doctrine of "tacking." See post, § 543.

<sup>29</sup> See 3 Pomeroy, Eq. Jur. § 1185.

<sup>30</sup> 4 Kent's Comm. 144; 2 Story, Eq. Jur. § 1021; Purcell's Adm'r v. Mather, 35 Ala. 570, 76 Am. Dec. 307; Bayler v. Com., 40 Pa. St. 37; Jones v. Richardson, 10 Metc. (Mass.) 481; Emerson v. European & N. A. Ry. Co., 67 Me. 387, 24 Am. Rep. 39; Looker v. Peckwell, 38 N. J. Law, 253, Kirchwey's Cas. 66.

<sup>31</sup> Pennock v. Coe, 23 How. (U. S.) 117; Holroyd v. Marshall, 10 (1172)

applied in the case of railroad mortgages in terms including property thereafter to be acquired by the railroad company.<sup>32</sup>

To the rule prohibiting such mortgages at law there are a few apparent exceptions, which are, however, explained by the application of other principles not inconsistent therewith. A thing which is added to another thing by way of accession, natural or artificial, so as to become a part thereof in view of the law, is subject to a previous mortgage upon the thing to which it is added. This occurs when a house is built upon mortgaged land, or articles or machinery are attached to a mortgaged building, so as to become part thereof, these being applications of the principle of fixtures, previously treated.<sup>33</sup> So, one may mortgage things which are the natural increase of any things which he owns at the date of the mortgage, he being said to have such increase "potentially."<sup>34</sup>

H. L. Cas. 191, Kirchwey's Cas. 42; *Smithurst v. Edmunds*, 14 N. J. Eq. 408, Kirchwey's Cas. 61; *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673; *Brett v. Carter*, 2 Lowell, 458, Fed. Cas. No. 1,844, Kirchwey's Cas. 67; *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. St. 366, 3 Am. Rep. 596; *Kribbs v. Alford*, 120 N. Y. 519, Kirchwey's Cas. 72; *Apperson v. Moore*, 30 Ark. 56; *Sillers v. Lester*, 48 Miss. 513. This is an example of an equitable lien. See post, § 561. But in Massachusetts, chattels acquired after the date of a mortgage do not become subject thereto until possession is taken by the mortgagee. *Moody v. Wright*, 13 Metc. (Mass.) 17, 46 Am. Dec. 706, Kirchwey's Cas. 54; *Low v. Pew*, 108 Mass. 347; *Chase v. Denny*, 130 Mass. 566. See 13 Harv. Law Rev. 598.

<sup>32</sup> *Platt v. New York & S. B. Ry. Co.*, 9 App. Div. (N. Y.) 87, 153 N. Y. 670, Kirchwey's Cas. 97; *Pierce v. Emery*, 32 N. H. 494, Kirchwey's Cas. 80; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *Central Trust Co. v. Kneeland*, 138 U. S. 414; *Pierce v. Milwaukee & St. P. R. Co.*, 24 Wis. 551; *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. St. 366.

<sup>33</sup> *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Wharton v. Moore*, 84 N. C. 479, 37 Am. Rep. 627; *Winslow v. Merchants Ins. Co.*, 4 Metc. (Mass.) 314, 38 Am. Dec. 368; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 522, 15 Am. St. Rep. 235. See ante, § 238.

<sup>34</sup> *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. St. 366, 3 Am.

Accordingly, it is held that the owner of land may mortgage crops to be grown thereon, "for the land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant."<sup>35</sup> In some states, however, it is held that a mortgage of annual crops (*fructus industriales*), which have not yet been planted, is invalid, especially as against attaching creditors, since such crops cannot be regarded as having even a potential existence, they being distinguished in this respect from the spontaneous product of the earth, or the increase of that which is already in existence.<sup>36</sup>

A mortgagee of land is a purchaser, within the meaning of the recording acts, and accordingly, if his mortgage is based on a valuable consideration, he takes priority as against a prior unrecorded instrument of which he has no notice.<sup>37</sup>

Rep. 596; *Emerson v. European & N. A. Ry. Co.*, 67 Me. 387, 24 Am. Rep. 39.

<sup>35</sup> *Hobart, C. J.*, in *Grantham v. Hawley*, Hob. 132, *Kirchwey's Cas.* 40. To the same effect, see *Jones v. Webster*, 48 Ala. 109; *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *Cotten v. Willoughby*, 83 N. C. 75; *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Cudworth v. Scott*, 41 N. H. 456; *Moore v. Byrum*, 10 Rich. (S. C.) 452, 30 Am. Rep. 58. But the crops must be clearly identified in the mortgage by reference to the land on which, and the year or years within which, they are to be grown. *Emerson v. European & N. A. Ry. Co.*, 67 Me. 387, 24 Am. Rep. 39; *Shaw v. Gilmore*, 81 Me. 396; *Stephens v. Tucker*, 55 Ga. 543.

<sup>36</sup> *Hutchinson v. Ford*, 9 Bush (Ky.) 318, 15 Am. Rep. 711; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 40 Am. St. Rep. 635, *Kirchwey's Cas.* 75; *Gittings v. Nelson*, 86 Ill. 591; *Long v. Hines*, 40 Kan. 220, 10 Am. St. Rep. 189. That such a mortgage is good even against creditors, see *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Butt v. Ellett*, 19 Wall. (U. S.) 544; *Wheeler v. Becker*, 68 Iowa, 723.

<sup>37</sup> See *Webb, Record of Title*, § 209; 1 *Stimson's Am. St. Law*, §§ 1611, 1625; *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *Chapman v. Miller*, 130 Mass. 289; *Fleschner v. Sumpter*, 12 Or. 161; *SeEVERS v. Delash-* (1174)



**§ 510. The ordinary form of a mortgage.**

A mortgage, being a conveyance of, or a contract concerning, an interest in land, must, under the Statute of Frauds, be in writing.<sup>38</sup> Though, as before shown, the view that a mortgage is a lien merely has for most purposes displaced the view that it is an estate on condition, the old form of conveyance on condition is usually retained. In states where the legal theory still obtains, conformity with the essentials of a conveyance is essential in order that the instrument may be sufficient to vest the legal title in the mortgagee,<sup>39</sup> and the omission of the words of inheritance necessary in a conveyance in fee simple will have the effect of reducing the estate of the mortgagee to one for life only.<sup>40</sup> In states where the equitable theory of a mortgage prevails, there is no necessity that the instrument have the essentials of a conveyance, it being sufficient that the instrument show an intention to mortgage, and that it be executed as required by the statute.<sup>41</sup> The statute quite frequently authorizes a simple and concise form, stating the bare essentials of a mortgage, and it is, of course, sufficient if this be followed.

The mortgaged land must always be described in the mortgage with sufficient particularity to enable it to be identified, as in the case of any other conveyance, but a reference to an-

mutt, 11 Iowa, 174, 77 Am. Dec. 139. Authorities cited in 20 Am. & Eng. Enc. Law (1st Ed.) 576.

<sup>38</sup> Bogert v. Bliss, 148 N. Y. 194, 51 Am. St. Rep. 684, Kirchwey's Cas. 121; McCue v. Smith, 9 Minn. 252 (Gil. 237), 86 Am. Dec. 100.

<sup>39</sup> See Dunn v. Raley, 58 Mo. 134; Peckham v. Haddock, 36 Ill. 38; Goodman v. Randall, 44 Conn. 321. See article by H. W. Chaplin, Esq., in 4 Harv. Law Rev. 1.

<sup>40</sup> Wilson v. King, 27 N. J. Eq. 374; Allendorff v. Gaujengigl, 146 Mass. 542; Smith v. Haskins, 22 R. I. 6.

<sup>41</sup> See Morrill v. Skinner, 57 Neb. 164; De Leon v. Higuera, 15 Cal. 483; Jackson v. Carswell, 34 Ga. 279.



other instrument, in which the property is described, is sufficient for this purpose.<sup>42</sup>

The requisites as to execution are ordinarily expressly named in the statute. An acknowledgment is usually requisite, as in the case of absolute transfers of land,<sup>43</sup> only as a preliminary to the record of the conveyance.

A mortgage must be delivered as if an absolute conveyance,<sup>44</sup> and there are a number of decisions to the effect that the mortgage must be accepted by the mortgagee, and that, until such acceptance, other persons may acquire rights in the premises, as by judgment or attachment liens, which will take precedence of the unaccepted mortgage.<sup>45</sup>

A mortgage must, in all the states, be recorded in order to be effective to create a lien as against a subsequent purchaser of the land for value without notice of its existence.<sup>46</sup> In

<sup>42</sup> *De Leon v. Higuera*, 15 Cal. 483; *Freed v. Brown*, 41 Ark. 495; *Atkins v. Paul*, 67 Ga. 97; *Cochran v. Utt*, 42 Ind. 267; *Stead v. Grosfield*, 67 Mich. 289; *Wilson v. Boyce*, 92 U. S. 320; *Boon v. Pierpont*, 28 N. J. Eq. 7; *Tucker v. Field*, 51 Miss. 191; 1 *Jones, Mortgages*, §§ 66, 67.

<sup>43</sup> See ante, § 405.

<sup>44</sup> *Freeman v. Peay*, 23 Ark. 439; *Bell v. Farmers' Bank of Kentucky*, 11 Bush (Ky.) 34, 21 Am. Rep. 205; *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Shirley v. Burch*, 16 Or. 83, 8 Am. St. Rep. 273; *Knapstein v. Tinette*, 156 Ill. 322; *Farmers' & Mechanics' Bank v. Drury*, 38 Vt. 426.

<sup>45</sup> *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Freeman v. Peay*, 23 Ark. 439; *Bell v. Farmers' Bank of Kentucky*, 11 Bush (Ky.) 34, 21 Am. Rep. 205; *Adams v. Johnson*, 41 Miss. 258; *Wallis v. Taylor*, 67 Tex. 431; *Alliance Milling Co. v. Eaton*, 86 Tex. 401; *Welsh v. Sackett*, 12 Wis. 243, 3 Gray's Cas. 714; *Oxnard v. Blake*, 45 Me. 602; *Woodbury v. Fisher*, 20 Ind. 389. Contra, *Merrills v. Swift*, 18 Conn. 257, 3 Gray's Cas. 677, 46 Am. Dec. 315; *Elsberry v. Boykin*, 55 Ala. 336. See the discussion of the analogous question of the necessity of acceptance in the case of an absolute conveyance, ante, § 407.

<sup>46</sup> See 1 *Stimson's Am. St. Law*, § 1858; 1 *Jones, Mortgages*, § 456. (1176)

some states there are peculiar provisions in regard to mortgages, as distinguished from other instruments affecting land, which in effect make their record within a certain time after execution effective even as against conveyances made and recorded between the time of execution of the mortgage and its record, thus depriving a purchaser of land, in certain cases, of the right to rely on the record title as against a mortgage of which he has no notice because not recorded.<sup>47</sup>

### § 511. Separate defeasance.

Though the condition or proviso that the conveyance shall be void in case of compliance by the mortgagor with his contract, termed the "defeasance," is usually inserted in the conveyance to the mortgagee, this is not, in most jurisdictions, necessary, and it may be contained in a separate instrument.<sup>48</sup> This practice has, however, been criticised, as liable to be productive of injury to the mortgagor.<sup>49</sup>

In order that a mortgage with a separate defeasance be effective as such at law, it is necessary that the two instruments be delivered at approximately the same time, or at least that they be parts of the same transaction.<sup>50</sup> Likewise, in order to

<sup>47</sup> 1 Jones, Mortgages, § 458.

<sup>48</sup> Kent's Comm. 141; Chase's Case, 1 Bland's Ch. (Md.) 206, 17 Am. Dec. 277; Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353, 20 Am. Dec. 145; Harbison v. Lemon, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376; Colwell v. Woods, 3 Watts (Pa.) 188, 27 Am. Dec. 345; Bunker v. Barron, 79 Me. 62, 1 Am. St. Rep. 282; Teal v. Walker, 111 U. S. 242; Kelley v. Leachman, 2 Idaho, 1112; Ferris v. Wilcox, 51 Mich. 105, 47 Am. Rep. 551.

<sup>49</sup> 4 Kent's Comm. 141; Baker v. Wind, 1 Ves. Sr. 160.

<sup>50</sup> Nugent v. Riley, 1 Metc. (Mass.) 117, 35 Am. Dec. 355; Bryan v. Cowart, 21 Ala. 92; Benneck v. Whipple, 12 Me. 346, 28 Am. Dec. 186; Lund v. Lund, 1 N. H. 39, 8 Am. Dec. 29; Gunn's Appeal, 55 Conn. 149; Moores v. Wills, 69 Tex. 109; Bearss v. Ford, 108 Ill. 16; Radford v. Folsom, 58 Iowa, 473; Lane v. Shears, 1 Wend. (N. Y.) 433. See Wilson v. Shoenberger's Ex'rs, 31 Pa. St. 295.

create a mortgage valid at law as well as in equity, the defeasance must be of as high a nature as the conveyance itself,—that is, if the latter is under seal, the defeasance must likewise be under seal, so that it may be regarded as a part of the same instrument, and it must be executed with the other formalities required in the case of a conveyance of land.<sup>51</sup>

The defeasance should be recorded with the absolute conveyance. In some states it is provided that, if the defeasance be not recorded, the grantee shall take nothing under the conveyance, or shall derive no benefit from the record of the conveyance,<sup>52</sup> while in others it is provided that, in such case, the conveyance shall pass an absolute title, except as against the maker of the instrument, his heirs and devisees, and, usually, persons having actual notice of the instrument of defeasance,<sup>53</sup> which is the rule in the absence of any statute on the subject.<sup>54</sup> In the first class of states, therefore, it is to the advantage of the mortgagee to see that the defeasance is recorded, while, in the latter class, the mortgagor or those claiming under him can alone suffer from the absence of the defeasance from the record.<sup>55</sup>

### § 512. Conveyance absolute in form.

While, as stated above, a defeasance in a separate instrument is not sufficient to create a legal mortgage if it is not exe-

<sup>51</sup> *Baker v. Wind*, 1 Ves. Sr. 160; *Lund v. Lund*, 1 N. H. 39, 8 Am. Dec. 29; *Kelleran v. Brown*, 4 Mass. 443, *Kirchwey's Cas.* 177; *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Warren v. Lovis*, 53 Me. 463.

<sup>52</sup> 1 *Stimson's Am. St. Law*, § 1860. See *Friedley v. Hamilton*, 17 Serg. & R. (Pa.) 70, 17 Am. Dec. 638; *Corpman v. Baccastow*, 84 Pa. St. 363; *Brown v. Dean*, 3 Wend. (N. Y.) 208.

<sup>53</sup> 1 *Stimson's Am. St. Law*, § 1860. See *Smith v. Monmouth Mut. Fire Ins. Co.*, 50 Me. 96; *Columbia Bank v. Jacobs*, 10 Mich. 349, 81 Am. Dec. 792; *Carpenter v. Lewis*, 119 Cal. 18.

<sup>54</sup> *Knight v. Dyer*, 57 Me. 174, 99 Am. Dec. 765; *Koons v. Grooves*, 20 Iowa, 373; *Frink v. Adams*, 36 N. J. Eq. 485; *Turman v. Bell*, 54 Ark. 273.

<sup>55</sup> See 1 *Jones, Mortgages*, § 513.

cuted with the same formalities as the deed of conveyance itself, in equity the rule is different, and there any agreement, however informally expressed or executed, showing an intention that an absolute conveyance should operate as a security for the repayment of money, is sufficient to make the transaction a mortgage.<sup>56</sup> Courts of equity, moreover, and, in some of the states, even courts of law, allow it to be shown by extrinsic evidence that a conveyance of land absolute in form, unaccompanied by a written defeasance, was intended as security merely, and such conveyance, shown to be so intended, is always regarded as a mortgage.<sup>57</sup>

<sup>56</sup> 4 Kent's Comm. 142; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489; *Eaton v. Green*, 22 Pick. (Mass.) 526; *James v. Morey*, 2 Cow. (N. Y.) 246; *Brinkman v. Jones*, 44 Wis. 498; *Den d. Skinner v. Cox*, 15 N. C. 59.

<sup>57</sup> *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 868; *State Bank of O'Neill v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Cobb v. Day*, 106 Mo. 278; *Ahern v. McCarthy*, 107 Cal. 382; *Scott v. Henry*, 13 Ark. 112; *McNeel's Ex'rs v. Auldridge*, 34 W. Va. 748; *Knapp v. Bailey*, 79 Me. 195, 1 Am. St. Rep. 295; *Tower v. Fetz*, 26 Neb. 706, 18 Am. St. Rep. 795; *Winston v. Burnell*, 44 Kan. 367, 21 Am. St. Rep. 289; *Morrow v. Jones*, 41 Neb. 867; *Horn v. Keteltas*, 46 N. Y. 605, *Finch's Cas.* 1106; *Plumer v. Guthrie*, 76 Pa. St. 441; *Hannay v. Thompson*, 14 Tex. 142; *Hills v. Loomis*, 42 Vt. 562.

That oral evidence is not admissible for this purpose in a court of law, see *Cotterell v. Purchase*, *Cas. temp. Talb.* 61, *Kirchwey's Cas.* 175; *Inhabitants of Reading v. Inhabitants of Weston*, 8 Conn. 117, 20 Am. Dec. 97, *Kirchwey's Cas.* 180; *Flint v. Sheldon*, 13 Mass. 443; *Stinchfield v. Milliken*, 71 Me. 567; *McClane v. White*, 5 Minn. 178 (*Gil.* 139); *Reilly v. Cullen*, 159 Mo. 322; *Gates v. Sutherland*, 76 Mich. 231. And this is the general rule in states in which the line of demarkation between equity and law is observed with considerable strictness. That such evidence is admissible at law, see *Swart v. Service*, 21 Wend. (N. Y.) 36, *Kirchwey's Cas.* 183; *Despard v. Walbridge*, 15 N. Y. 374, *Kirchwey's Cas.* 374, and (under statute) *German Ins. Co. of Freeport v. Gibe*, 162 Ill. 251.

In Pennsylvania, by statute, a conveyance made since June 6, 1881, cannot be shown to be a mortgage by oral evidence. *Sankey v. Hawley*, 118 Pa. St. 30; *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 868.



To show by oral evidence, however, that a conveyance absolute in form was intended to be a mortgage, the evidence must be clear and convincing, the presumption being that the instrument is what it purports to be.<sup>58</sup> In the case, moreover, of an oral defeasance, as in the case of a separate written defeasance, a purchaser for value from the mortgagee is not affected thereby unless he has notice of its existence.<sup>59</sup>

The admission of evidence for the purpose of showing an absolute conveyance to be a mortgage is evidently an exception to the rule which excludes extrinsic evidence to vary or control a written instrument, and there has been considerable discussion as to the principle on which the exception to the general rule can be allowed. In some cases the right to introduce such evidence is stated to exist only when the written defeasance has been omitted as the result of fraud, accident, or mistake,<sup>60</sup> while in others the attempt to utilize the absolute conveyance otherwise than as a mortgage, contrary to the intention of the parties, is regarded as itself constituting a fraud, authorizing the introduction of oral evidence of the

<sup>58</sup> *Coyle v. Davis*, 116 U. S. 108; *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644; *Winston v. Burnell*, 44 Kan. 367, 21 Am. St. Rep. 289; *Waters v. Crabtree*, 105 N. C. 394; *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175; *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258; *Keithley v. Wood*, 151 Ill. 566, 42 Am. St. Rep. 265; *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 868.

<sup>59</sup> *Jackson v. Lawrence*, 117 U. S. 679; *Conner v. Chase*, 15 Vt. 775; *Brophy Min. Co. v. Brophy & Dale Gold & Silver Min. Co.*, 15 Nev. 110; *Frink v. Adams*, 36 N. J. Eq. 485; *Meehan v. Forrester*, 52 N. Y. 277; *Pancake v. Cauffman*, 114 Pa. St. 113; *Waters v. Crabtree*, 105 N. C. 394. See *Knapp v. Bailey*, 79 Me. 195, 1 Am. St. Rep. 295.

<sup>60</sup> 4 Kent's Comm. 142; *Blakemore v. Byrnside*, 7 Ark. 505; *Washburn v. Merrills*, 1 Day (Conn.) 139; *Crutcher v. Muir*, 90 Ky. 142, 29 Am. St. Rep. 366; *Lokerson v. Stillwell*, 13 N. J. Eq. 358; *Sprague v. Bond*, 115 N. C. 530; *McClane v. White*, 5 Minn. 178 (Gil. 139). In Georgia, the statute excludes parol evidence, except to show fraud in procuring the mortgage. *Hall v. Waller*, 66 Ga. 483.



real intention of the parties.<sup>61</sup> The courts, however, more usually, at the present day, give relief by treating an absolute conveyance as a mortgage, on oral evidence to that effect, without undertaking to base it upon any theory of fraud, accident, or mistake, but rather as an independent head of equity,<sup>62</sup> and it would seem that the recognition of a right to such relief is an almost necessary result of the equitable doctrine that any agreement or device by which it is sought to defeat the mortgagor's right of redemption is invalid.

— Sale with right of repurchase.

The fact that an absolute conveyance is accompanied by an agreement, or is subject to a condition, that the grantor may repurchase within a given time, at the same or a different price, is not conclusive that the transaction is a mortgage. Such a transaction is perfectly valid if it is what it appears to be, and the right to repurchase is lost if not exercised within the stipulated time.<sup>63</sup> A difficult question, however, frequently arises, as to whether a transaction in form a conditional sale is not in fact a mortgage, as being intended to secure the payment of money, and a court of equity will closely scrutinize the transaction to see if such is the case, and will,

<sup>61</sup> *Babcock v. Wyman*, 19 How. (U. S.) 289; *Hershey v. Luce*, 56 Ark. 320; *Pierce v. Robinson*, 13 Cal. 116; *O'Neill v. Capelle*, 62 Mo. 202; *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 868; *Wright v. Bates*, 13 Vt. 341. See *Ruckman v. Alwood*, 71 Ill. 155; *Hassam v. Barrett*, 115 Mass. 256; 3 Pomeroy, Eq. Jur. § 1196.

<sup>62</sup> See *Ruckman v. Alwood*, 71 Ill. 155, quoted in *Kirchwey's Cas.* 200.

<sup>63</sup> 4 Kent's Comm. 144; Pomeroy, Eq. Jur. § 1195; *Thornborough v. Baker*, 3 Swanst. 631, *Kirchwey's Cas.* 147; *Barrell v. Sabine*, 1 Vern. 268; *Conway's Executors & Devisees v. Alexander*, 7 Cranch (U. S.) 218, *Kirchwey's Cas.* 151; *Horbach v. Hill*, 112 U. S. 144; *Macaulay v. Porter*, 71 N. Y. 173; *Moss v. Green*, 10 Leigh (Va.) 251, 34 Am. Dec. 731; *Rue v. Dole*, 107 Ill. 275; *Flagg v. Mann*, 14 Pick. (Mass.) 467, 478; *Ruffier v. Womack*, 30 Tex. 332.

if it appears to be such, give the grantor the right to redeem, with any other rights which belong to a mortgagor. In case of doubt, the courts incline to consider the transaction a mortgage,<sup>64</sup> thus applying a different rule from that applied to an absolute conveyance not accompanied by an agreement for repurchase.

— Considerations determining character of conveyance.

In determining the question whether an absolute conveyance is a mortgage,—whether there is or is not an agreement giving the right of repurchase,—the fact that an indebtedness on the part of the grantor to the grantee is created by the transaction, or that a former indebtedness is thereby continued in force, is usually conclusive that it is a mortgage.<sup>65</sup> The absence of a covenant or other express agreement to repay the money is not, however, conclusive that the conveyance is not a mortgage.<sup>66</sup> Among the other circumstances tending

<sup>64</sup> *Conway's Executors & Devisees v. Alexander*, 7 Cranch (U. S.) 218, *Kirchwey's Cas.* 151; *Russell v. Southard*, 12 How. (U. S.) 139, *Kirchwey's Cas.* 157; *Cosby v. Buchanan*, 81 Ala. 574; *Farmer v. Grose*, 42 Cal. 169; *Matthews v. Sheehan*, 69 N. Y. 585; *Trucks v. Lindsey*, 18 Iowa, 504; *Poindexter v. McCannon*, 16 N. C. 373, 18 Am. Dec. 591; *Edrington v. Harper*, 3 J. J. Marsh. (Ky.) 354, 20 Am. Dec. 145; *Keithley v. Wood*, 151 Ill. 566, 42 Am. St. Rep. 265; *O'Neill v. Capelle*, 62 Mo. 202.

<sup>65</sup> 4 Kent's Cmm. 144; 3 Pomeroy, Eq. Jur. § 1195; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847, *Kirchwey's Cas.* 167; *Conway's Executors & Devisees v. Alexander*, 7 Cranch (U. S.) 237, *Kirchwey's Cas.* 151; *Slowey v. McMurray*, 27 Mo. 113, 72 Am. Dec. 251; *Keithley v. Wood*, 151 Ill. 566, 42 Am. St. Rep. 265; *Montgomery v. Spect*, 55 Cal. 352; *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 868; *Hopper v. Smyser*, 90 Md. 363; *Fisher v. Green*, 142 Ill. 80.

<sup>66</sup> *Matthews v. Sheehan*, 69 N. Y. 585, *Kirchwey's Cas.* 164; *Floyer v. Lavington*, 1 P. Wms. 268; *Russell v. Southard*, 12 How. (U. S.) 139, *Kirchwey's Cas.* 157; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847, *Kirchwey's Cas.* 167; *Brown v. Dewe*, 1 Sandf. Ch. (N. Y.) 57; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671, *Kirchwey's Cas.* 191; *Horn v. Keteltas*, 46 N. Y. 605, *Finch's Cas.* 1106.

to show that the transaction is a mortgage, and not an absolute conveyance, are the inadequacy of the sum paid by the grantee to the grantor as a consideration for the land, and the fact that the grantor remained in possession.<sup>67</sup>

**§ 513. The obligation secured.**

A mortgage is usually given to secure the payment of a sum of money, and the debt is usually evidenced by a note, bond, or other instrument, separate from the mortgage, though this is not necessary.<sup>68</sup>

Except as against creditors who may be defrauded thereby, a mortgage securing in terms the payment of a sum of money is valid, although the mortgagor received no part of such sum, or any other consideration for the making of the mortgage, the owner of land having the same right to make a present of a mortgage on the land as to give the land itself.<sup>69</sup> So the mortgage may be given to secure the payment of a debt which existed before the making of the mortgage;<sup>70</sup> but in such a

<sup>67</sup> *Conway's Executors & Devisees v. Alexander*, 7 Cranch (U. S.) 218; *Kirchwey's Cas.* 151; *Russell v. Southard*, 12 How. (U. S.) 139, *Kirchwey's Cas.* 157; *Flagg v. Mann*, 2 Sumn. 486, *Fed. Cas. No.* 4,847, *Kirchwey's Cas.* 167; *Bacon v. Brown*, 19 Conn. 34; *Hoffman v. Ryan*, 21 W. Va. 417; *Williams v. Reggan*, 111 Ala. 621; *Co. Litt.* 205a, *Butler's note*.

<sup>68</sup> *Conway's Executors & Devisees v. Alexander*, 7 Cranch (U. S.) 218; *Hickox v. Lowe*, 10 Cal. 197; *Jacques v. Weeks*, 7 Watts (Pa.) 268; *Smith v. People's Bank*, 24 Me. 185; *Hodgdon v. Shannon*, 44 N. H. 572; *Eacho v. Cosby*, 26 Grat. (Va.) 112; *Rice v. Rice*, 4 Pick. (Mass.) 349.

<sup>69</sup> *Bucklin v. Bucklin*, 1 Abb. Dec. (N. Y.) 242, *Kirchwey's Cas.* 203; *Campbell v. Tompkins*, 32 N. J. Eq. 170; *Brooks v. Dalrymple*, 12 Allen (Mass.) 102; *Brigham v. Brown*, 44 Mich. 59.

<sup>70</sup> *Morse v. Godfrey*, 3 Story, 364, *Fed. Cas. No.* 9,856; *Gafford v. Stearns*, 51 Ala. 434; *Rea v. Wilson*, 112 Iowa, 517; *De Lancey v. Stearns*, 66 N. Y. 157; *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224, 47 Am. St. Rep. 753; *Mingus v. Condit*, 23 N. J. Eq. 313; 1 *Jones, Mortgages*, § 460.

case the mortgagee is not usually regarded as a purchaser for value, unless some additional consideration is given, and consequently is not protected as against a prior conveyance of which he had no notice.<sup>71</sup>

— Description of obligation.

A mortgage given to secure a debt existent at the making of the mortgage, or contemporaneous therewith, is valid, even as against subsequent purchasers and creditors, although it does not explicitly state the amount of such debt or liability, provided there are means of ascertaining such amount.<sup>72</sup> And extrinsic evidence is admissible for the purpose of showing the debt which the mortgage was intended to secure.<sup>73</sup> The statement in the mortgage as to the sum secured is not conclusive in that regard, and it may be shown by the mortgagor that the lien was for a less sum,<sup>74</sup> or even that the mort-

<sup>71</sup> *Morse v. Godfrey*, 3 Story, 364, Fed. Cas. No. 9,856; *Gafford v. Stearns*, 51 Ala. 434; *Mingus v. Condit*, 23 N. J. Eq. 313; *De Lancey v. Stearns*, 66 N. Y. 157; *Lewis v. Anderson*, 20 Ohio St. 281; *Schumpert v. Dillard*, 55 Miss. 348; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250.

<sup>72</sup> *Stoughton v. Pasco*, 5 Conn. 442, 13 Am. Dec. 72, *Kirchwey's Cas.* 268; *Robinson v. Williams*, 22 N. Y. 380, *Kirchwey's Cas.* 274; *Youngs v. Wilson*, 27 N. Y. 351, *Kirchwey's Cas.* 280; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315; *New v. Sailors*, 114 Ind. 407, 5 Am. St. Rep. 632; *Bowen v. Ratcliff*, 140 Ind. 393, 49 Am. St. Rep. 203; *Bullock v. Battenhausen*, 108 Ill. 28; *Clark v. Hyman*, 55 Iowa, 14, 39 Am. Rep. 160; *Shirras v. Caig*, 7 Cranch (U. S.) 34; *Hurd v. Robinson*, 11 Ohio St. 232.

<sup>73</sup> *Doe d. Duval's Heirs v. McLoskey*, 1 Ala. 708; *Aull v. Lee*, 61 Mo. 160; *Babcock v. Lisk*, 57 Ill. 327; *Moses v. Hatfield*, 27 S. C. 324; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Hurd v. Robinson*, 11 Ohio St. 232; *Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645; *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210; *Baxter v. McIntire*, 13 Gray (Mass.) 168. In some jurisdictions, however, the statute requires a specific description of the debt. See *Mans v. McKellip*, 38 Md. 231; *Page v. Ordway*, 40 N. H. 253.

<sup>74</sup> *Mackey v. Brownfield*, 13 Serg. & R. (Pa.) 239; *Nazro v. Ware*, (1184)



gage was not a lien for the payment of money, as stated therein, but was given for a different purpose.<sup>75</sup>

A mortgage which is in terms security for a certain amount cannot, as against third persons, be extended by agreement between the mortgagor and mortgagee so as to cover sums subsequently advanced by the latter to the former.<sup>76</sup> But, as between the parties to the mortgage, a written agreement, made after its execution, that it shall be security for a debt other than that which it was first intended to secure, is effective,<sup>77</sup> this constituting in effect an equitable lien on the land for such additional sum.<sup>78</sup>

— Future advances.

A mortgage given to secure advances to be made in the future to the mortgagor, or liabilities to be assumed for him by the mortgagee in the future, is valid even as against creditors and subsequent purchasers.<sup>79</sup> It is, by the weight of

38 Minn. 443; *Burnett v. Wright*, 135 N. Y. 543; *Louisville Banking Co. v. Leonard*, 90 Ky. 106; *Ruloff v. Hazen*, 124 Mich. 570; *Huckaba v. Abbott*, 87 Ala. 409.

<sup>75</sup> *Baird v. Baird*, 145 N. Y. 659, *Kirchwey's Cas.* 211; *Hill v. Hoole*, 116 N. Y. 299; *Wearse v. Peirce*, 24 Pick. (Mass.) 141; *Hannan v. Hannan*, 123 Mass. 441; *Saunders v. Dunn*, 174 Mass. 164; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335.

<sup>76</sup> *Schiffer v. Feagin*, 51 Ala. 335; *Fuller v. Griffith*, 91 Iowa, 632; *Stone v. Lane*, 10 Allen (Mass.) 74; *Bramhall v. Flood*, 41 Conn. 68; *Lee v. Stone*, 5 Gill & J. (Md.) 1; *McCaughrin v. Williams*, 15 S. C. 505; *Large v. Van Doren*, 14 N. J. Eq. 208; *McGready v. McGready*, 17 Mo. 597.

<sup>77</sup> See *Wylly v. Screven*, 98 Ga. 213; *Stoddard v. Hart*, 23 N. Y. 556, *Kirchwey's Cas.* 116. An oral agreement to this effect is insufficient, it would seem, under the Statute of Frauds, and it has been so decided. *Stoddard v. Hart*, 23 N. Y. 556, *Kirchwey's Cas.* 116; *Johnson v. Anderson*, 30 Ark. 745; *Ex parte Hooper*, 19 Ves. 477, 1 Mer. 7, *Kirchwey's Cas.* 114. *Contra*, *Walker v. Walker*, 17 S. C. 329. And see *Brown v. Gaffney*, 32 Ill. 251.

<sup>78</sup> See post, § 561.

<sup>79</sup> *Shirras v. Caig*, 7 Cranch (U. S.) 34; *United States v. Hooe*, 3



authority, sufficient if the mortgage states that it is to secure future advances, without stating the total amount of such advances, since a subsequent purchaser or incumbrancer is thereby put on inquiry as to the debt secured;<sup>80</sup> and the failure to state that future advances are secured is immaterial if the total amount of the debt secured is named.<sup>81</sup>

A mortgage securing future advances is valid, as against creditors and purchasers, to the amount to which advances have been made before the mortgagee obtains knowledge of the accrual of the rights of such third persons.<sup>82</sup> As to whether the mortgagee is affected with knowledge of a subsequent

Cranch (U. S.) 73; *Boswell v. Goodwin*, 31 Conn. 74, 81 Am. Dec. 169; *Robinson v. Williams*, 22 N. Y. 380, *Kirchwey's Cas.* 274; *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *Summers v. Roos*, 42 Miss. 749, 2 Am. Rep. 653; *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622; *Kramer v. Trustees of Farmers' & Mechanics' Bank of Steubenville*, 15 Ohio, 253; *Nicklin v. Betts Spring Co.*, 11 Or. 406, 50 Am. Rep. 477; *Collins v. Carlile*, 13 Ill. 254.

<sup>80</sup> *Jarratt v. McDaniel*, 32 Ark. 598; *Allen v. Lathrop*, 46 Ga. 133; *Witzinski v. Everman*, 51 Miss. 841; *Michigan Ins. Co. of Detroit v. Brown*, 11 Mich. 266; *Robinson v. Williams*, 22 N. Y. 381. *Contra*, *Pettibone v. Griswold*, 4 Conn. 158, 10 Am. Dec. 106, *Kirchwey's Cas.* 265. See *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102.

In some states there are statutory provisions, requiring the debt secured to be described in the mortgage, which restrict the right to make mortgages for future advances. See 1 *Jones, Mortgages*, § 366; *Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645; *Maus v. McKellip*, 38 Md. 231; *Johnson v. Richardson*, 38 N. Y. 353.

<sup>81</sup> *Shirras v. Caig*, 7 Cranch (U. S.) 34; *Summers v. Roos*, 42 Miss. 749, 2 Am. Rep. 653; *Collins v. Carlile*, 13 Ill. 254; *Louisville Banking Co. v. Leonard*, 90 Ky. 106; *Foster v. Reynolds*, 38 Mo. 553; *Griffin v. New Jersey Oil Co.*, 11 N. J. Eq. 49; *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102.

<sup>82</sup> *Shirras v. Caig*, 7 Cranch (U. S.) 51; *Hopkinson v. Rolt*, 9 H. L. Cas. 514; *Boswell v. Goodwin*, 31 Conn. 74; *Griffin v. New Jersey Oil Co.*, 11 N. J. Eq. 49; *Spader v. Lawler*, 17 Ohio, 371, 49 Am. Dec. 461; and cases cited in two notes next following.

mortgage or other incumbrance, within the rule, by the recording of such mortgage, the authorities are in conflict. Some decisions are to the effect that he is not so charged with notice, and consequently may with safety make advances until he has actual knowledge of such subsequent incumbrance,<sup>83</sup> while others hold that the mortgage constitutes a lien for each advance, at least when the making of advances is voluntary, only when the advance is made, and that an incumbrance appearing of record before the making of any advance takes precedence thereof, the mortgagee being thus bound to consult the records before making any advance.<sup>84</sup>

There are a number of decisions to the effect that, even though the advances are made with knowledge of an incumbrance accruing since the date of the mortgage in favor of a third person, they take precedence thereof, provided the making of such advances was not optional with the mortgagee, but he was bound by contract to make them.<sup>85</sup> And in at least one case it is decided that any mortgage purporting to secure future advances is security for the advances when made, even as against an incumbrance of which the mortgagee has notice, since the owner of the incumbrance has notice, from the record, of the possibility that such advances will be made.<sup>86</sup>

<sup>83</sup> *Ackerman v. Hunsicker*, 85 N. Y. 43, 39 Am. Rep. 621; *Frye v. Bank of Illinois*, 11 Ill. 367; *Ward v. Cooke*, 17 N. J. Eq. 93; *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *Union Nat. Bank v. Milburn, etc., Co.*, 7 N. D. 201; 3 *Pomeroy*, Eq. Jur. § 1199.

<sup>84</sup> *Ladue v. Detroit & M. R. Co.*, 13 Mich. 380, 87 Am. Dec. 759; *Spader v. Lawler*, 17 Ohio, 371, 49 Am. Dec. 461; *Bank of Montgomery County's Appeal*, 36 Pa. St. 170.

<sup>85</sup> *Boswell v. Goodwin*, 31 Conn. 74; *Brinckmeyer v. Browneller*, 55 Ind. 487; *Heintze v. Bentley*, 34 N. J. Eq. 562; *Ripley v. Harris*, 3 Biss. 199, Fed. Cas. No. 11,853. See *McClure v. Roman*, 52 Pa. St. 458.

<sup>86</sup> *Witczinski v. Everman*, 51 Miss. 841. This view is supported  
(1187)

— **Mortgage to indemnify surety.**

A mortgage is quite frequently made for the purpose of securing a guarantor or surety against loss by reason of his contract of guaranty or suretyship. Such a mortgage is, in its general effect, similar to one made to secure future advances, and is governed by the same rules.

— **Change in amount or evidence of obligation.**

Provided the debt secured remains the same, the fact that the evidence thereof is changed, as by the substitution of one note for another, or the giving of a renewal note, does not affect the validity of the mortgage,<sup>87</sup> and the amount of the debt may be changed, provided the sum originally secured is not exceeded.<sup>88</sup> The fact that the substituted note differs otherwise than in amount from the original note is immaterial;<sup>89</sup> and an instrument of an entirely different character may be substituted, provided the actual obligation secured by the mortgage remains the same.<sup>90</sup> Accordingly, the fact that the mortgage debt is merged in a judgment for the debt does not affect the lien of the mortgage as security for the debt.<sup>91</sup>

by Mr. Pomeroy, who discusses the whole question with his usual clearness and acumen. See 3 Pomeroy, Eq. Jur. §§ 1197-1199.

<sup>87</sup> *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538, *Kirchwey's Cas.* 742; *Dunham v. Dey*, 15 Johns. (N. Y.) 554, 8 Am. Dec. 282; *Dumell v. Terstegge*, 23 Ind. 397, 85 Am. Dec. 466; *Bolles v. Chauncey*, 8 Conn. 389; *Cullum v. Branch Bank at Mobile*, 23 Ala. 797; *Flower v. Elwood*, 66 Ill. 446; *London & San Francisco Bank v. Bandmann*, 120 Cal. 220, 65 Am. St. Rep. 179; *Taber v. Hamlin*, 97 Mass. 489, 93 Am. Dec. 113.

<sup>88</sup> *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538, *Kirchwey's Cas.* 742; *Chase v. Abbott*, 20 Iowa, 154; *McDonald v. McDonald*, 16 Vt. 630; *Walters v. Walters*, 73 Ind. 425.

<sup>89</sup> *Pond v. Clarke*, 14 Conn. 334; *Darst v. Bates*, 51 Ill. 439; *Pomeroy v. Rice*, 16 Pick. (Mass.) 22; *Port v. Robbins*, 35 Iowa, 208.

<sup>90</sup> *Davis v. Maynard*, 9 Mass. 242; *Huginin v. Starkweather*, 10 Ill. 492.

<sup>91</sup> *Priest v. Wheelock*, 58 Ill. 116; *Jewett v. Hamlin*, 68 Me. 172; (1188)

—— **Personal liability of mortgagor.**

The mortgagor is personally liable for the amount of the mortgage debt, as a rule, by reason of his signature on the note or bond evidencing the debt, and sometimes by force of a covenant in the mortgage to pay the debt, but such liability is not necessary to the validity of the mortgage.<sup>92</sup> Accordingly, a mortgage by a married woman has been held to be valid and enforceable, though she could not be made liable personally for the debt;<sup>93</sup> and, in the majority of states, the mortgage remains valid, though an action to enforce the personal liability of the mortgagor is barred by limitations.<sup>94</sup> So, the fact that the maker of the note secured has been discharged from personal liability in a bankruptcy proceeding does not affect the lien of the mortgage nor the right to enforce it.<sup>95</sup>

—— **Mortgage to secure support.**

As stated in the definition of a mortgage, it may be made to secure the performance of an obligation other than the payment of money. Among the occasional mortgages of this character may be mentioned those by which the mortgagor secures the performance of his contract to support the mortgagee or another person during his life. While such conveyances are usually spoken of as mortgages,<sup>96</sup> in some

Torrey v. Cook, 116 Mass. 163; Morrison v. Morrison, 38 Iowa, 73. See Butler v. Miller, 1 N. Y. 496, Kirchwey's Cas. 746.

<sup>92</sup> Floyer v. Lavington, 1 P. Wms. 268; Mills v. Darling, 43 Me. 565; Rice v. Rice, 4 Pick. (Mass.) 349; Glover v. Payn, 19 Wend. (N. Y.) 518; Davis v. Demming, 12 W. Va. 246.

<sup>93</sup> Brookings v. White, 49 Me. 479; Van Cott v. Heath, 9 Wis. 516; Haffey v. Carey, 73 Pa. St. 431. See, to the contrary, Heburn v. Warner, 112 Mass. 271, 17 Am. Rep. 86, criticised in 10 Am. Law Rev. 371.

<sup>94</sup> See post, § 549.

<sup>95</sup> Bush v. Cooper, 26 Miss. 599, Kirchwey's Cas. 750; Brown v. Hoover, 77 N. C. 40; 2 Jones, Mortgages, § 1231.

<sup>96</sup> Chase v. Peck, 21 N. Y. 581, Kirchwey's Cas. 124; Gilson v. Gil-



states it is denied that they have any mortgage character, and they are regarded rather as conveyances on condition.<sup>97</sup> Occasionally, in case of nonperformance of the stipulation for support, the right of redemption by payment of adequate damages has been recognized.<sup>98</sup> Such an agreement is *prima facie* of a personal character, and consequently the mortgagor cannot, by transferring the property, relieve himself of the obligation of support, and place it on another person,<sup>99</sup> nor can the mortgagee, if he is the person to be supported, transfer his interest in the mortgage, so as to give another the right to such support.<sup>100</sup>

#### § 514. Illegality of purpose of mortgage.

If the mortgage is given for an illegal purpose, as when it is the price of future sexual intercourse,<sup>101</sup> or when it is

son, 2 Allen (Mass.) 115; Coleman v. Whitney, 62 Vt. 123; Powers v. Patten, 71 Me. 583; Hawkins v. Clermont, 15 Mich. 511. See 1 Jones, Mortgages, §§ 388-394.

<sup>97</sup> Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Soper v. Guernsey, 71 Pa. St. 219.

<sup>98</sup> See Henry v. Tupper, 29 Vt. 358; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700.

Sometimes, when the agreement for support was the consideration for the conveyance of the land to the mortgagor by the mortgagee, the forfeiture has been strictly enforced. Soper v. Guernsey, 71 Pa. St. 219; Bogie v. Bogie, 41 Wis. 209.

<sup>99</sup> Bryant v. Erskine, 55 Me. 153; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Flanders v. Lamphear, 9 N. H. 201. Compare Bodwell Granite Co. v. Lane, 83 Me. 168.

<sup>100</sup> Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Bryant v. Erskine, 55 Me. 153.

<sup>101</sup> W—— v. B——, 32 Beav. 574, Kirchwey's Cas. 219.

A mortgage given in consideration of past sexual intercourse would be a valid lien, since such intercourse is regarded, not as an illegal consideration, but as no consideration (Pollock, Cont. [6th Ed.] 288), and a consideration is unnecessary to support a mortgage, and, even though a consideration were necessary, a seal would be sufficient. (1190)



given to obtain the suppression of a criminal prosecution,<sup>102</sup> neither party can obtain relief in connection therewith by means of a legal proceeding; that is, the mortgagee cannot enforce the mortgage,<sup>103</sup> nor can the mortgagor have it canceled.<sup>104</sup> So, a mortgage given to secure a debt incurred for liquor sold in violation of law,<sup>105</sup> or a gambling debt,<sup>106</sup> will not be enforced. And a mortgage securing notes given in consideration of a payment of money of the Confederate States has been held to be illegal and unenforceable.<sup>107</sup>

When the purpose of a mortgage is to secure payment of a debt which is composed partly of legal and partly of illegal items, if those which are legal can be separated from the balance, the mortgage will be upheld as to them.<sup>108</sup> So, a mortgage undertaking to secure two or more notes has been upheld as security for a legal note, though invalid as to an illegal note.<sup>109</sup> But a mortgage securing but one note, if that

See *Gray v. Mathias*, 5 Ves. 286; *Vallance v. Blagden*, 26 Ch. Div. 353; *Brown v. Kinsey*, 81 N. C. 245; *Wyant v. Leshner*, 23 Pa. St. 338.

<sup>102</sup> *Atwood v. Fisk*, 101 Mass. 363, *Kirchwey's Cas.* 253; *Pearce v. Wilson*, 111 Pa. St. 14, 56 Am. Rep. 243; *Peed v. McKee*, 42 Iowa, 689.

<sup>103</sup> *McQuade v. Rosecrans*, 36 Ohio St. 442, *Kirchwey's Cas.* 248; *Gilbert v. Holmes*, 64 Ill. 548; *Hyatt v. James' Adm'r*, 2 Bush (Ky.) 463, 92 Am. Dec. 505.

After foreclosure, however, of a mortgage given for an illegal debt, even though the mortgagee obtains the title to the land under the foreclosure, the mortgagor cannot recover the land, in the absence of specific statutory authority therefor, the same rule applying as in the case of an absolute conveyance of land on an illegal consideration. *McLaughlin v. Cosgrove*, 99 Mass. 4, *Kirchwey's Cas.* 252.

<sup>104</sup> *Atwood v. Fisk*, 101 Mass. 363, *Kirchwey's Cas.* 253.

<sup>105</sup> *Baker v. Collins*, 9 Allen (Mass.) 253.

<sup>106</sup> *International Bank of Chicago v. Vankirk*, 39 Ill. App. 23; *Barnard v. Backhaus*, 52 Wis. 593.

<sup>107</sup> *Stillman v. Looney*, 3 Cold. (Tenn.) 20, *Kirchwey's Cas.* 251. *Contra, Scheible v. Bacho*, 41 Ala. 423.

<sup>108</sup> 1 Jones, *Mortgages*, § 620.

<sup>109</sup> *Morris v. Way*, 16 Ohio, 469.

note is based in part on an illegal consideration, would seem to be void, since the note is void as a whole.<sup>110</sup>

At the present day, in but few of the states is a mortgage totally invalid because it is security for a debt bearing an illegal rate of interest; it being more usually provided merely that the usurious interest shall be forfeited, or, in some states, all interest. In a number of states there is no restriction upon the rate of interest.<sup>111</sup>

### § 515. Agreements for collateral advantage.

There are, in decisions rendered in England and Ireland, *dicta* to the effect that, if the making of a mortgage is accompanied by an agreement in reference either to the mortgaged premises or to another subject, by which the mortgagor obtains some "collateral advantage," such agreement is void.<sup>112</sup> This theory has, however, been exploded by recent decisions, and the rule established that any agreement between the mortgagor and mortgagee, however advantageous to the latter, if not attended with fraud or oppression, is valid, provided it does not interfere with the right of redeeming from the mortgage.<sup>113</sup> So, in this country it has been decided, in at least

<sup>110</sup> *McQuade v. Rosecrans*, 36 Ohio St. 442, *Kirchwey's Cas.* 248; *Brigham v. Potter*, 14 Gray (Mass.) 522; *Bick v. Seal*, 45 Mo. App. 475. But in *Shaw v. Carpenter*, 54 Vt. 155, *Kirchwey's Cas.* 256, it was held that, in such a case, the mortgage was valid to the extent to which the consideration for the note was legal, such part of the consideration being, by well-settled principles, recoverable by the proper action, without reference to the note. See 1 Daniel, *Neg. Inst.* (4th Ed.) § 204.

<sup>111</sup> See 1 Jones, *Mortgages*, § 633 et seq.

<sup>112</sup> See Coote, *Mortgages*, 19, 20; *Jennings v. Ward*, 2 Vern. 520, *Kirchwey's Cas.* 471; *In re Edwards' Estate*, 11 Ir. Ch. 367, *Kirchwey's Cas.* 471; *Broad v. Selfe*, 11 Wkly. Rep. 1036, *Kirchwey's Cas.* 473.

<sup>113</sup> *Biggs v. Hoddinott* [1898] 2 Ch. 307, *Kirchwey's Cas.* 475; *Santley v. Wilde* [1899] 2 Ch. 474, *Kirchwey's Cas.* 488. See *Noakes v.* (1192)

one case, that any agreement made at the time of executing the mortgage, if not affecting the right of redemption, and not intended for the purpose of evading the usury laws, is valid.<sup>114</sup>

## II. RIGHTS AND LIABILITIES INCIDENT TO THE MORTGAGE RELATION.

The mortgagor, as being the owner of the land, has the same right of control thereover as before the making of the mortgage, except as against the owner of the mortgage. The interest of the owner of the mortgage, even in states where he has the legal title, is regarded, for most purposes, as a mere chose in action, and is personal property.

The relation of mortgagee and mortgagor is not that of trustee and cestui que trust, but the former cannot, by virtue of his position, make a profit at the expense of the latter, and in some states he cannot purchase the land if sold for taxes.

In states where the mortgagee has the legal title, he is usually entitled to possession of the land, in the absence of a statute or an agreement to the contrary. In other states the mortgagor is entitled to the possession. The mortgagee must account to the mortgagor for all rents and profits received by him while in possession, or which he might have received by the exercise of diligence, while the mortgagor, if in possession, owes no such duty to the mortgagee.

Upon the making of a mortgage of land subject to a previous lease, the mortgagee, if having the legal title, is entitled to the rent as the assignee of the reversion, but he cannot disturb the lessee's occupancy. If a lease is made by the mortgagor after the mortgage, the mortgagee may enforce his right to possession against the lessee, but the latter, to avoid ejection, may attorn and pay the rent to the mortgagee.

The mortgagee is entitled to make such expenditures on ac-

Rice, [1902] App. Cas. 24, and 13 Harv. Law Rev. 595, 15 Harv. Law Rev. 661.

<sup>114</sup> Gleason's Adm'x v. Burke, 20 N. J. Eq. 300, Kirchwey's Cas. 496. See, also, Uhlfelder v. Carter, 64 Ala. 527.

count of the mortgagor as are necessary to preserve his lien unimpaired, and to make necessary repairs on the premises, but is not usually entitled to credit for improvements made by him while in possession.

The mortgagor and mortgagee have each an insurable interest, the former to the value of the land, and the latter to the extent of his debt.

The mortgagee has a right to an injunction to restrain impairment of his security by injuries to the land, and has also, in most states, a right of action for damages on account of such injuries. In states where he has the legal title he has certain rights of action based thereon for acts of spoliation by the mortgagor or by third persons.

#### § 516. The nature of the mortgagor's interest.

Whichever theory as to the character of the mortgagee's interest be adopted, the mortgagor is always regarded as the substantial owner of the land.<sup>115</sup> He may convey or devise<sup>116</sup> or lease it.<sup>117</sup> Upon his death, his estate in the land passes to his heirs or otherwise, in the same way as if there were no mortgage,<sup>118</sup> and the widow of the mortgagor is entitled to

<sup>115</sup> *Casborne v. Scarfe*, 1 Atk. 603; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Willington v. Gale*, 7 Mass. 138; *Trustees of Donations v. Streeter*, 64 N. H. 106; *Jackson v. Willard*, 4 Johns. (N. Y.) 42; *Cotton v. Carlisle*, 85 Ala. 175, 7 Am. St. Rep. 29; *Den d. Dimon v. Dimon*, 10 N. J. Law, 156; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331; *Wilkins v. French*, 20 Me. 111; *White v. Rittenmyer*, 30 Iowa, 268; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Howard v. Robinson*, 5 Cush. (Mass.) 119; *Whittemore v. Gibbs*, 24 N. H. 484; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229.

<sup>116</sup> 3 *Pomeroy*, Eq. Jur. § 1204; *Casborne v. Scarfe*, 1 Atk. 603; *White v. Whitney*, 3 Metc. (Mass.) 81; *Clark v. Reyburn*, 8 Wall. (U. S.) 318; *Moore v. Anders*, 14 Ark. 630, 60 Am. Dec. 551. See post, § 525.

<sup>117</sup> *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401; *Hutchinson v. Dearing*, 20 Ala. 798; *Kennett v. Plummer*, 28 Mo. 142. See post, § 521.

<sup>118</sup> *Burgess v. Wheate*, 1 W. Bl. 123; *White v. Rittenmyer*, 30 Iowa, 268; *Packer v. Rochester & S. R. Co.*, 17 N. Y. 283.



dower, and the husband to curtesy.<sup>119</sup> Likewise, the mortgagor may make a second mortgage of the property, or, in fact, any number of mortgages in succession, each mortgagee taking subject to prior mortgages of which he has notice.<sup>120</sup>

— **Liability to execution.**

The mortgagor's interest is liable to sale under execution for his debts;<sup>121</sup> but it is not, in a number of jurisdictions, liable to execution under a judgment for the mortgage debt, on the ground that this would in effect involve a foreclosure of the mortgage in an unauthorized way.<sup>122</sup> In other jurisdictions it is held that this may be done, the sale under execution being of the land free from the burden of the mortgage.<sup>123</sup>

<sup>119</sup> See ante, §§ 184, 208.

<sup>120</sup> Coote, Mortgages, 371. See post, §§ 541, 545.

<sup>121</sup> *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623, *Kirchwey's Cas.* 299; *Cushing v. Hurd*, 4 Pick. (Mass.) 253, 16 Am. Dec. 335; *Wiggin v. Heywood*, 118 Mass. 514; *Livermore v. Boutelle*, 11 Gray (Mass.) 217, 71 Am. Dec. 708; *Clinton Nat. Bank v. Manwarring*, 39 Iowa, 281; *Turner v. Watkins*, 31 Ark. 429; *Finley v. Thayer*, 42 Ill. 350; *Lord v. Crowell*, 75 Me. 399; *Gassenheimer v. Molton*, 80 Ala. 521; *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105; *Punderson v. Brown*, 1 Day (Conn.) 93, 2 Am. Dec. 53; *Harwell v. Fitts*, 20 Ga. 723. The common-law rule was otherwise. 4 *Kent's Comm.* 160; *Plunket v. Penson*, 2 Atk. 290; *Van Ness v. Hyatt*, 13 Pet. (U. S.) 294.

<sup>122</sup> *Pugh v. Fairmount Gold & Silver Min. Co.*, 112 U. S. 238; *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105; *Atkins v. Sawyer*, 1 Pick. (Mass.) 351, 11 Am. Dec. 188; *Delaplaine v. Hitchcock*, 6 Hill (N. Y.) 14; *Camp v. Coxe*, 18 N. C. 52; *Palmer v. Foote*, 7 Paige (N. Y.) 437; *Carpenter v. Bowen*, 42 Miss. 28; *Thornton v. Pigg*, 24 Mo. 249; *Goring's Ex'x v. Shreve*, 7 Dana (Ky.) 64; *Boone v. Armstrong*, 87 Ind. 168.

Execution may, however, be levied on the premises in behalf of one to whom the note was assigned without the mortgage. *Crane v. March*, 4 Pick. (Mass.) 131, 16 Am. Dec. 329.

<sup>123</sup> *Hollister v. Dillon*, 4 Ohio St. 197; *Cottingham v. Springer*, 88 Ill. 90; *Lydecker v. Bogert*, 38 N. J. Eq. 136; *Whitmore v. Tatum*,



§ 517. **Nature of the mortgagee's interest.**

The mortgagee has, as before stated, in England and in some of the states, the legal title to the land. This title, however, does not make him the owner of the land, except in so far as the exercise of the rights of an owner is necessary or desirable for the protection of his security.<sup>124</sup> Accordingly, his interest, as being a mere chose in action, is regarded as personal property, although the property mortgaged be freehold, and, on his death intestate, it passes to his personal representatives, and not to his heirs.<sup>125</sup> So, the mortgagee's interest before foreclosure is, as being a mere chose in action, not subject to levy under execution against him.<sup>126</sup>

In jurisdictions where the mortgagee has the legal title, he may bring ejectment against any person wrongfully in possession of the land,<sup>127</sup> and, being entitled to the possession as

54 Ark. 457; *Crooker v. Frazier*, 52 Me. 406. See *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623, *Kirchwey's Cas.* 299.

<sup>124</sup> *Wilkins v. French*, 20 Me. 111; *Ellison v. Daniels*, 11 N. H. 274; *Shields v. Lozear*, 34 N. J. Law, 496, 3 Am. Rep. 256, *Kirchwey's Cas.* 728; *Cotton v. Carlisle*, 85 Ala. 175, 7 Am. St. Rep. 29; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, *Kirchwey's Cas.* 634; *Norcross v. Norcross*, 105 Mass. 265.

<sup>125</sup> *Collamer v. Langdon*, 29 Vt. 32; *Webster v. Calden*, 56 Me. 204; *Ladd v. Wiggin*, 35 N. H. 421; *Stevenson v. Polk*, 71 Iowa, 278, 290; *Baldwin v. Hatchett*, 56 Ala. 461; *Mills v. Shepard*, 30 Conn. 98; *Steel v. Steel*, 4 Allen (Mass.) 417; *Buckley v. Daley*, 45 Miss. 338; *Terhune v. Bray's Ex'rs*, 16 N. J. Law, 54.

Formerly, in England, the mortgage passed to the heir as real estate, but he held it in trust for the personal representative. *Williams, Real Prop.* 427. This rule was changed by statute providing that the mortgagee's interest should pass to the personal representative. 44 & 45 Vict. c. 41, § 30.

<sup>126</sup> *Huntington v. Smith*, 4 Conn. 235, *Kirchwey's Cas.* 295; *Brown v. Bates*, 55 Me. 520, 92 Am. Dec. 613; *Trapnall's Adm'x v. State Bank*, 18 Ark. 53; *Eaton v. Whiting*, 3 Pick. (Mass.) 484, *Kirchwey's Cas.* 298; *Glass v. Ellison*, 9 N. H. 69; *Jackson v. Willard*, 4 Johns. (N. Y.) 41; *Rickert v. Madeira*, 1 Rawle (Pa.) 325; *Butman v. James*, 34 Minn. 547.

<sup>127</sup> 4 Kent's Comm. 164; *Carroll v. Ballance*, 26 Ill. 9, 79 Am. Dec. (1196)

against the mortgagor,<sup>128</sup> may sue him in that form of action.<sup>129</sup> But even in such states, a third person sued in ejectment by the mortgagor is usually not allowed to set up as a defense the outstanding legal title in the mortgagee.<sup>130</sup> In some of such states, the foreclosure of the equity of redemption is usually by means of a common-law action based on the existence of a legal title in the mortgagee.<sup>131</sup>

In jurisdictions where the theory of a legal title in the mortgagee is adopted, the mortgagee of a leasehold estate has been held liable, as an assignee, upon covenants contained in the lease.<sup>132</sup> Where, however, the purely equitable conception of a mortgage prevails, the rule is otherwise, except, perhaps, when the mortgagee takes possession.<sup>133</sup>

354; *Keith v. Swan*, 11 Mass. 216; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Hobart v. Sanborn*, 13 N. H. 226, 38 Am. Dec. 483; *Drayton v. Marshall*, 1 Rice Eq. (S. C.) 373, 33 Am. Dec. 84; *Buckley v. Daley*, 45 Miss. 338.

<sup>128</sup> See post, § 519.

<sup>129</sup> *Keech v. Hall*, 1 Doug. 21, *Kirchwey's Cas.* 314; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, *Kirchwey's Cas.* 634; *Doe d. Shute v. Grimes*, 7 Blackf. (Ind.) 1; *Brastow v. Barrett*, 82 Me. 456; *Tryon v. Munson*, 77 Pa. St. 250, *Finch's Cas.* 538.

<sup>130</sup> *Smith v. Vincent*, 15 Conn. 1, 38 Am. Dec. 52; *Burr v. Spencer*, 26 Conn. 159, 68 Am. Dec. 379; *Allen v. Kellam*, 69 Ala. 447; *Denby v. Mellgrew*, 58 Ala. 147; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Hall v. Lance*, 25 Ill. 277; *Ellison v. Daniels*, 11 N. H. 274 (writ of entry); *Den d. Dimon v. Dimon*, 10 N. J. Law, 156; *Stinson v. Ross*, 51 Me. 556, 81 Am. Dec. 591 (writ of entry). But in Maryland the mortgagor cannot sue in ejectment. *Beall v. Harwood*, 2 Har. & J. (Md.) 167, 3 Am. Dec. 532; *Berry v. Derwart*, 55 Md. 66.

<sup>131</sup> See post, § 552.

<sup>132</sup> *McMurphy v. Minot*, 4 N. H. 251, *Kirchwey's Cas.* 289, 2 *Gray's Cas.* 743 (compare *Trustees of Donations v. Streeter*, 64 N. H. 106); *Williams v. Bosanquet*, 1 Brod. & B. 238; *Farmers' Bank v. Mutual Assur. Soc.*, 4 Leigh (Va.) 69; *Mayhew v. Hardesty*, 8 Md. 479.

<sup>133</sup> *Astor v. Hoyt*, 5 Wend. (N. Y.) 603, *Kirchwey's Cas.* 292; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *McKee v. Angelrodt*, 16 Mo. 283.

## § 518. The relation not fiduciary.

Though the mortgagee has, in those states in which the common-law theory of a mortgage is adopted, the legal title, while the mortgagor has an equitable interest merely, the relation is not one of trust, but is adversary, rather, in its nature.<sup>134</sup> The position of the mortgagee is, however, similar to that of a trustee, in that, having procured the title, and perhaps the right of possession, for one purpose,—that is, to secure his debt,—he cannot utilize it for another purpose,—that is, to make profits for his own advantage. Accordingly, the mortgagee is required to account for the rents and profits received by him while in possession.<sup>135</sup> So, if the mortgagee, by reason of his position, obtains a new lease upon the land, such lease is regarded, not as belonging to him absolutely, but as a part of the interest mortgaged, and so subject to the right of redemption.<sup>136</sup>

In some jurisdictions, however, it is held that if the mortgagee buys the land at tax sale, he cannot assert the title so acquired as against the mortgagor or other lienors.<sup>137</sup> In stating this view, the courts sometimes tend to base it on a *quasi* trust relation existing between the mortgagor and mortgagee, though it might perhaps be as well supported, in the majority of cases, on the ground that the mortgagee, as well as the mortgagor, is under an obligation to pay the taxes.<sup>138</sup> In some

<sup>134</sup> *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 177, *Kirchwey's Cas.* 570; *King v. State Mutual Fire Ins. Co.*, 7 Cush. (Mass.) 7; *Griffin v. Marine Co. of Chicago*, 52 Ill. 130, 142; *Ten Eyck v. Craig*, 62 N. Y. 406, *Kirchwey's Cas.* 590.

<sup>135</sup> See post, § 520.

<sup>136</sup> *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 30, *Kirchwey's Cas.* 579; *Manlove v. Bale*, 2 Vern. 84, *Kirchwey's Cas.* 569. See *Moore v. Titman*, 44 Ill. 367.

<sup>137</sup> *Hall v. Westcott*, 15 R. I. 373, *Kirchwey's Cas.* 598; *Woodbury v. Swan*, 59 N. H. 22; *Moore v. Titman*, 44 Ill. 367; *Fair v. Brown*, 40 Iowa, 209; *Connecticut Mut. Life Ins. Co. v. Bulte*, 45 Mich. 113.

<sup>138</sup> See *Cooley, Taxation*, 503; *Schenck v. Kelley*, 88 Ind. 444.

jurisdictions, however, a purchase at tax sale by the mortgagee is valid, as he owes no duty to the mortgagor or other persons interested in the land to pay the taxes.<sup>139</sup>

Apart from the question as to his right to purchase at tax sale, it is generally agreed that he may purchase any outstanding title,<sup>140</sup> provided he does not do so to the injury of the mortgagor,<sup>141</sup> and may accordingly purchase at a sale under a prior mortgage, judgment, or other lien.<sup>142</sup>

### § 519. The right to possession of the land.

Under the common-law view of a mortgage as passing the legal title, the mortgagee is entitled to the possession of the premises, and this is still generally the rule in states where the legal theory of a mortgage is held, except in so far as it may be changed by statute.<sup>143</sup> When, however, the security is sufficient, the mortgagee rarely asserts his right to possession, although entitled thereto, since he is bound, if he does take possession, to account for the rents and profits of the land,<sup>144</sup> and there is nothing to be gained by taking possession.<sup>145</sup>

<sup>139</sup> *Williams v. Townsend*, 31 N. Y. 411, *Kirchwey's Cas.* 585; *Waterson v. Devoe*, 18 Kan. 223.

<sup>140</sup> *Walthall's Ex'rs v. Rives*, 34 Ala. 92; *Waterson v. Devoe*, 18 Kan. 223; *Cameron v. Irwin*, 5 Hill (N. Y.) 280; *Harrison v. Roberts*, 6 Fla. 711.

<sup>141</sup> See *Griffin v. Marine Co. of Chicago*, 52 Ill. 130.

<sup>142</sup> *Kirkwood v. Thompson*, 2 De Gex, J. & S. 613, *Kirchwey's Cas.* 574; *Ten Eyck v. Craig*, 62 N. Y. 406, *Kirchwey's Cas.* 590; *Woodlee v. Burch*, 43 Mo. 231; *Walthall's Ex'rs v. Rives*, 34 Ala. 92; *Harrison v. Roberts*, 6 Fla. 711; *Roberts v. Fleming*, 53 Ill. 196.

<sup>143</sup> 4 Kent's Comm. 155; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, *Kirchwey's Cas.* 634; *Knox v. Eaton*, 38 Ala. 345; *Lacky v. Holbrook*, 11 Metc. (Mass.) 458; *Kannady v. McCarron*, 18 Ark. 166; *Hobart v. Sanborn*, 13 N. H. 226, 38 Am. Dec. 483; *Gray v. Gillespie*, 59 N. H. 469; *Campbell v. Poultney*, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559; *Brastow v. Barrett*, 82 Me. 456; *Youngman v. Railroad Co.*, 65 Pa. St. 278. Contra, *Shields v. Lozeur*, 34 N. J. Law, 496, 3 Am. Rep. 256, *Kirchwey's Cas.* 728; *Allen v. Everly*, 24 Ohio St. 97.

<sup>144</sup> See post, § 520



In states where the equitable theory of a mortgage prevails, and the mortgagee has no legal title, the mortgagee is not entitled to the possession as against the mortgagor, since he has merely a lien on the land. As a matter of fact, however, there appears to be, in all such states, a statutory provision that the mortgagee shall remain in possession till foreclosure.<sup>146</sup> But even in the latter class of states it is held that the mortgagor cannot, after default, recover possession of the land from the mortgagee, his only remedy being to redeem,<sup>147</sup> and by some cases it is apparently asserted that he has no such right against the mortgagee even before default.<sup>148</sup>

— Agreement as to possession.

The rule prevailing in the particular jurisdiction as to the possession of the mortgaged land may be changed by agreement, express or implied. Accordingly, where the mortgagee is otherwise entitled to possession, it may be agreed that the mortgagor shall have it,<sup>149</sup> and such an agreement is implied

<sup>145</sup> See 4 Kent's Comm. 155.

<sup>146</sup> See 1 Stimson's Am. St. Law, §§ 1882, 1883; 1 Jones, Mortgages, § 18-57.

<sup>147</sup> *Phyfe v. Riley*, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55; *Pell v. Ulmar*, 18 N. Y. 139; *Fee v. Swingly*, 6 Mont. 596; *Frink v. Le Roy*, 49 Cal. 314; *Jones v. Rigby*, 41 Minn. 530; *Cooke v. Cooper*, 18 Or. 142, 17 Am. St. Rep. 709; *Tallman v. Ely*, 6 Wis. 244; *Brinkman v. Jones*, 44 Wis. 512; 1 Jones, Mortgages, § 715.

The fact that the mortgagee in possession may have received rents and profits from the land to an amount greater than the sum due on the mortgage does not affect his right to retain possession until they are applied by judgment of a court in satisfaction of the mortgage. *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519, *Kirchwey's Cas.* 334.

<sup>148</sup> *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314; *Duke v. Reed*, 64 Tex. 705; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519, *Kirchwey's Cas.* 334 (semble). Compare *Howell v. Leavitt*, 95 N. Y. 617, *Finch's Cas.* 1043.

<sup>149</sup> *Youngman v. Railroad Co.*, 65 Pa. St. 278; *Furbush v. Goodwin*, 29 N. H. 321.



if the provisions of the mortgage evidently contemplate the mortgagor's possession,<sup>150</sup> as when the mortgagor agrees to cultivate the land.<sup>151</sup> So, on the other hand, in states where the rule is that the mortgagor is entitled to possession, it may by agreement be given to the mortgagee.<sup>152</sup>

§ 520. Rents and profits—Mortgagor in possession.

A mortgagor who is in possession, either by consent of the mortgagee or otherwise, is entitled to receive and apply to his own use the rents and profits of the land;<sup>153</sup> and this is so, even when the mortgage expressly includes rents and profits.<sup>154</sup> But if the property is insufficient in value to afford proper security to the mortgagee, and the mortgagor is insolvent, and the mortgagee is without other means of protection, a court of equity will generally appoint a receiver to take charge of the rents and profits.<sup>155</sup>

<sup>150</sup> *Soper v. Guernsey*, 71 Pa. St. 219; *Clay v. Wren*, 34 Me. 187; *Dearborn v. Dearborn*, 9 N. H. 117; *Wales v. Mellen*, 1 Gray (Mass.) 512.

<sup>151</sup> *Flagg v. Flagg*, 11 Pick. (Mass.) 475.

<sup>152</sup> *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613; *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314.

<sup>153</sup> 4 Kent's Comm. 157; *Teal v. Walker*, 111 U. S. 242, *Kirchwey's Cas.* 340; *Harrison v. Wyse*, 24 Conn. 1, 63 Am. Dec. 151; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201; *Hardin v. Hardin*, 34 S. C. 77, 27 Am. St. Rep. 786; *Boston Bank v. Reed*, 8 Pick. (Mass.) 462; *Killebrew v. Hines*, 104 N. C. 182, 17 Am. St. Rep. 672; *Childs v. Hurd*, 32 W. Va. 66, 87.

<sup>154</sup> *Gilman v. Illinois & Mississippi Telegraph Co.*, 91 U. S. 603; *In re Life Ass'n of America*, 96 Mo. 632; *Mississippi Valley & W. Ry. Co. v. United States Express Co.*, 81 Ill. 534. But see *Dunham v. Isett*, 15 Iowa, 284.

<sup>155</sup> *Price v. Dowdy*, 34 Ark. 285; *Haas v. Chicago Building Soc.*, 89 Ill. 498; *Phillips v. Eiland*, 52 Miss. 721; *Astor v. Turner*, 11 Paige (N. Y.) 436, 43 Am. Dec. 766; *Schreiber v. Carey*, 48 Wis. 208. See, on this question, note to *Hardin v. Hardin*, 27 Am. St. Rep. 794. Sometimes the court will not appoint a receiver on account of the

— **Mortgagee in possession.**

The mortgagee, if in possession, is entitled to the rents and profits, but he is bound to account therefor on redemption by the mortgagor, or on foreclosure, and apply them on the mortgage debt.<sup>156</sup> And the mortgagee in possession is bound to account not only for rents and profits actually received by him, but also for what he might have received by the exercise of reasonable diligence in renting or otherwise utilizing the mortgaged premises.<sup>157</sup> If he does exercise such diligence, he is liable only for what he has received.<sup>158</sup> If the mortgagee himself occupies the premises, he is liable for a reasonable rent;<sup>159</sup> but he is not liable for an increase of rent-

mere inadequacy of the security and insolvency of the mortgagor, but requires a showing of waste, or bad faith of some sort. See *Hardin v. Hardin*, 34 S. C. 77, 27 Am. St. Rep. 786; *Cortleyeu v. Hathaway*, 11 N. J. Eq. 40, 64 Am. Dec. 478. See, also, *Haas v. Chicago Building Soc.*, 89 Ill. 498.

<sup>156</sup> *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Murdock v. Clarke*, 59 Cal. 683; *Peugh v. Davis*, 113 U. S. 542; *Dawson v. Drake*, 30 N. J. Eq. 601; *Ten Eyck v. Casad*, 15 Iowa, 524; *Caldwell v. Hall*, 49 Ark. 509, 4 Am. St. Rep. 64; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Brown v. South Boston Sav. Bank*, 148 Mass. 300; *Irwin v. Davidson*, 38 N. C. 311; *Clark v. Finlon*, 90 Ill. 245; *Seaver v. Durant*, 39 Vt. 103.

<sup>157</sup> *Anonymous*, 1 Vern. 45, *Kirchwey's Cas.* 543; *Hughes v. Williams*, 12 Ves. 493, *Kirchwey's Cas.* 543; *Schaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Dec. 211, *Kirchwey's Cas.* 548; *Daniel v. Coker*, 70 Ala. 260; *Miller v. Lincoln*, 6 Gray (Mass.) 556; *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281; *Sanders v. Wilson*, 34 Vt. 318; *Clark v. Finlon*, 90 Ill. 245; *Milliken v. Bailey*, 61 Me. 316; *Walsh v. Rutgers Fire Ins. Co.*, 13 Abb. Pr. (N. Y.) 33.

<sup>158</sup> *Anonymous*, 1 Vern. 45, *Kirchwey's Cas.* 543; *Brown v. South Boston Sav. Bank*, 148 Mass. 300; *Felch v. Felch* (Vt.) 9 Law Rep. 217, *Kirchwey's Cas.* 545; *Moshier v. Norton*, 100 Ill. 63; *Gerrish v. Black*, 104 Mass. 400; *Hogan v. Stone*, 1 Ala. 496; *Peugh v. Davis*, 113 U. S. 542.

<sup>159</sup> 4 Kent's Comm. 166; *Van Buren v. Olmstead*, 5 Paige (N. Y.) 9; *Strong v. Blanchard*, 4 Allen (Mass.) 538; *Sanders v. Wilson*, 34 Vt. 318; *Barnett v. Nelson*, 54 Iowa, 41, 37 Am. Rep. 183.

al value or profits arising from improvements made by himself, with the cost of which he is not credited.<sup>160</sup>

In order thus to charge one, as a mortgagee in possession, with the profits which he might have received by the exercise of reasonable diligence, it is necessary that he be in possession as mortgagee, and with knowledge that he occupies such a relation, and he is not so liable if he is in possession otherwise, or he believes himself to be a purchaser, and it afterwards turns out that he has merely a mortgage or other lien on the land.<sup>161</sup>

— Annual rests.

The mortgagee is usually required, in accounting for the rents and profits received, to make a rest at the end of each year, if at that time the rents and profits received exceed the interest due, and to deduct such excess from the principal sum in determining the amount to bear interest during the following year, since otherwise the mortgagee would have the use of such excess without paying therefor.<sup>162</sup> Occasionally the court will require the rests to be made more frequently than once a year.<sup>163</sup>

<sup>160</sup> 4 Kent's Comm. 166; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385, *Kirchwey's Cas.* 524; *Jones v. Fletcher*, 42 Ark. 422; *Dozier v. Mitchell*, 65 Ala. 511; *Montgomery v. Chadwick*, 7 Iowa, 114; *McArthur v. Franklin*, 16 Ohio St. 193; *Hidden v. Jordan*, 28 Cal. 302.

<sup>161</sup> *Parkinson v. Hanbury*, L. R. 2 H. L. 1, *Kirchwey's Cas.* 550; *Morris v. Budlong*, 78 N. Y. 555, *Kirchwey's Cas.* 559; *Daniel v. Coker*, 70 Ala. 260; *Young v. Omohundro*, 69 Md. 424; *Gaskell v. Viquesney*, 122 Ind. 244; *Hall v. Westcott*, 17 R. I. 504. See *Barnard v. Jennison*, 27 Mich. 230.

<sup>162</sup> *Van Vronker v. Eastman*, 7 Metc. (Mass.) 157, *Kirchwey's Cas.* 561; *Moshier v. Norton*, 100 Ill. 63, 73; *Shaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Dec. 211, *Kirchwey's Cas.* 548; *Gladding v. Warner*, 36 Vt. 54; *Snively v. Pickle*, 29 Grat. (Va.) 27; *Green v. Wescott*, 13 Wis. 606; *Gordon v. Lewis*, 2 Sumn. 143, *Fed. Cas. No.* 5,613.

<sup>163</sup> *Adams v. Sayre*, 76 Ala. 509; *Gibson v. Crehore*, 5 Pick. (Mass.) 146.

**§ 521. Effect of a lease of the land—Lease before mortgage.**

In the case of a lease made by the mortgagor before making the mortgage, the mortgagee, if entitled to the possession as having the legal title, may at any time demand that the lessee pay the rent to him instead of to the mortgagor, and the lessee, after such notice, is liable to the mortgagee for rent, accruing since the date of the mortgage, which is due and as yet unpaid, and likewise for all rent thereafter becoming due,<sup>164</sup> unless, perhaps, this has been paid in advance.<sup>165</sup> The rights of the tenant under such lease to possession of the premises cannot, however, be affected by the making of a subsequent mortgage.<sup>166</sup>

**— Lease after mortgage.**

After making the mortgage, the mortgagor cannot, even though in possession, make a lease of the land which will affect any right which the mortgagee may have, by virtue of his legal title, to obtain possession, and the latter may, if entitled to possession, eject the lessee.<sup>167</sup> In the case of a lease thus made by the mortgagor, the mortgage previously

<sup>164</sup> *Moss v. Gallimore*, 1 Doug. 279, *Kirchwey's Cas.* 316; *King v. Housatonic R. Co.*, 45 Conn. 226, *Kirchwey's Cas.* 338; *White v. Whitney*, 3 Metc. (Mass.) 87; *Mirick v. Hoppin*, 118 Mass. 582; *Kimball v. Lockwood*, 6 R. I. 138, *Kirchwey's Cas.* 332; *Comer v. Sheehan*, 74 Ala. 452.

<sup>165</sup> By some decisions, he is liable to the mortgagee for rent due after the notice, even though he paid it in advance before receiving notice. *De Nicholls v. Saunders*, L. R. 5 C. P. 589; *Cook v. Guerra*, L. R. 7 C. P. 132. Contra, *Stone v. Patterson*, 19 Pick. (Mass.) 476, *Kirchwey's Cas.* 331.

<sup>166</sup> *Moss v. Gallimore*, 1 Doug. 279, *Kirchwey's Cas.* 316.

<sup>167</sup> *Keech v. Hall*, 1 Doug. 21, *Kirchwey's Cas.* 314; *Doe d. Roby v. Maisey*, 8 Barn. & C. 767; *McDermott v. Burke*, 16 Cal. 580; *Comer v. Sheehan*, 74 Ala. 452; *Russum v. Wanser*, 53 Md. 92; *Stedman v. Gassett*, 18 Vt. 346; *Gartside v. Outley*, 58 Ill. 210; *Henshaw v. Wells*, 9 Humph. (Tenn.) 568; *Downard v. Goff*, 40 Iowa, 597; *Lane v. King*, 8 Wend. (N. Y.) 584, *Finch's Cas.* 197.



made is not regarded as vesting in the mortgagee a title to the reversion to which the rent is incident, and consequently, since there is no privity of estate or contract between him and the lessee, he cannot, by action or by distress, proceed for the recovery of rent.<sup>168</sup> The tenant under such lease may, however, in order to avoid eviction by the mortgagee, "attorn" to the mortgagee by recognizing him as his landlord, thus creating a new tenancy, and such attornment is a good defense to the claim of the mortgagor for rent.<sup>169</sup> Such a new tenancy under the mortgagee has been held to be sufficiently shown by the fact that the mortgagee has notified the mortgagor's lessee to pay the rent to him, and the latter has not repudiated the demand;<sup>170</sup> and likewise by the fact that the tenant continues to occupy the premises after the mortgagee has entered thereon under his mortgage.<sup>171</sup>

#### § 522. Expenditures by mortgagee.

The mortgagee is entitled to pay off an incumbrance on the land prior to his mortgage, in order to protect the latter, and may claim a credit for the amount so paid;<sup>172</sup> and

<sup>168</sup> *McKircher v. Hawley*, 16 Johns. (N. Y.) 289; *Massachusetts Hospital Life Ins. Co. v. Wilson*, 10 Metc. (Mass.) 126; *Teal v. Walker*, 111 U. S. 242, *Kirchwey's Cas.* 332; *Kimball v. Lockwood*, 6 R. I. 138, *Kirchwey's Cas.* 332; *Evans v. Elliot*, 9 Adol. & E. 342; *Drakford v. Turk*, 75 Ala. 339; *Stedman v. Gassett*, 18 Vt. 346; *Hogsett v. Ellis*, 17 Mich. 351; *Bartlett v. Hitchcock*, 10 Ill. App. 87.

<sup>169</sup> *Jones v. Clark*, 20 Johns. (N. Y.) 51, *Kirchwey's Cas.* 322; *Magill v. Hinsdale*, 6 Conn. 464a; *Sanderson v. Price*, 21 N. J. Law, 637; *Gartside v. Outley*, 58 Ill. 210; *Kimball v. Lockwood*, 6 R. I. 138, *Kirchwey's Cas.* 332; *Comer v. Sheehan*, 74 Ala. 452. *Contra*, *Hogsett v. Ellis*, 17 Mich. 351.

<sup>170</sup> *Brown v. Storey*, 1 Man. & G. 117; *Stedman v. Gassett*, 18 Vt. 346. Compare *Bartlett v. Hitchcock*, 10 Ill. App. 87.

<sup>171</sup> *Massachusetts Hospital Life Ins. Co. v. Wilson*, 10 Metc. (Mass.) 126; *Gartside v. Outley*, 58 Ill. 210.

<sup>172</sup> *McCormick v. Knox*, 105 U. S. 122; *Harper v. Ely*, 70 Ill. 581, *Kirchwey's Cas.* 563; *Weld v. Sabin*, 20 N. H. 533, 51 Am. Dec. 240;



on this principle he is entitled to be repaid, as part of the mortgage debt, any expenditures by him for taxes on the property.<sup>173</sup> He is also entitled to recover reasonable expenses incurred in defending the mortgagor's title.<sup>174</sup> He can claim reimbursement for insurance premiums paid by him when the mortgagor agreed to insure, and failed to do so.<sup>175</sup>

The mortgagee is not usually allowed for personal services in connection with the management of the premises, though he may charge for the services of a bailiff whom it is necessary to employ.<sup>176</sup>

#### — Repairs and improvements.

The mortgagee in possession is allowed for the cost of any necessary repairs made by him.<sup>177</sup> He can claim to be reimbursed for improvements, as distinct from repairs, if these are necessary for the proper enjoyment of the premises, but

*Davis v. Winn*, 2 Allen (Mass.) 111; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519, *Kirchwey's Cas.* 334; *Comstock v. Michael*, 17 Neb. 288.

<sup>173</sup> *Sidenberg v. Ely*, 90 N. Y. 257, *Kirchwey's Cas.* 564; *McCormick v. Knox*, 105 U. S. 122; *Mix v. Hotchkiss*, 14 Conn. 32; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Gooch v. Botts*, 110 Mo. 419.

<sup>174</sup> *Godfrey v. Watson*, 3 Atk. 517, *Kirchwey's Cas.* 563; *Miller v. Whittier*, 36 Me. 577; *Riddle v. Bowman*, 27 N. H. 236; *Clark v. Smith*, 1 N. J. Eq. 122.

<sup>175</sup> *Harper v. Ely*, 70 Ill. 581; *Stinchfield v. Milliken*, 71 Me. 567; *Fowley v. Palmer*, 5 Gray (Mass.) 549.

<sup>176</sup> 4 *Kent's Comm.* 166; *Godfrey v. Watson*, 3 Atk. 517; *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342; *Eaton v. Simonds*, 14 Pick. (Mass.) 98; *Harper v. Ely*, 70 Ill. 581; *Elmer v. Loper*, 25 N. J. Eq. 475; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62. By some cases, however, the mortgagee has been allowed a commission on rents collected by him. *Waterman v. Curtis*, 26 Conn. 241; *Gerrish v. Black*, 104 Mass. 400.

<sup>177</sup> *McCumber v. Gilman*, 15 Ill. 381, *Kirchwey's Cas.* 536; *Caldwell v. Hall*, 49 Ark. 508, 4 Am. St. Rep. 64; *Sparhawk v. Wills*, 5 Gray (Mass.) 423; *Harper's Appeal*, 64 Pa. St. 315; *Dewey v. Brownell*, 54 Vt. 441. *Contra*, *Barthell v. Syverson*, 54 Iowa, 160.

not usually if they are merely calculated to render the property more desirable.<sup>178</sup> But a mortgagee in possession or one standing in his place, as a purchaser under a void foreclosure sale,<sup>179</sup> who, in the reasonable belief that he has the absolute title to the land, makes lasting improvements thereon, is usually allowed therefor in a proceeding by the mortgagor for redemption,<sup>180</sup> on the general equitable principle before referred to.<sup>181</sup>

### § 523. Insurance—By mortgagor.

The mortgagor has an insurable interest in the land,<sup>182</sup> and may insure to the full value of the property, even though

<sup>178</sup> *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385, *Kirchwey's Cas.* 524; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 21 Am. St. Rep. 231; *Bradley v. Merrill*, 88 Me. 319; *Malone v. Roy*, 107 Cal. 518; *Dougherty v. McColgan*, 6 Gill & J. (Md.) 275; *McCumber v. Gilman*, 15 Ill. 381, *Kirchwey's Cas.* 536; *Miller v. Curry*, 124 Ind. 48; *Adkins v. Lewis*, 5 Or. 292; *Wells v. Van Dyke*, 109 Pa. St. 330.

The mortgagor is, of course, bound to allow for the improvements if he consented to the making of them by the mortgagee. *Bradey v. Merrill*, 88 Me. 319; *Cazenove v. Cutler*, 4 Metc. (Mass.) 246; *Shepard v. Jones*, 21 Ch. Div. 469, *Kirchwey's Cas.* 514, per *Jessel, M. R.*

In England the rule is more liberal to the mortgagee, and he is allowed for lasting improvements of a reasonable character, increasing the value of the property. *Sandon v. Hooper*, 6 Beav. 246, *Kirchwey's Cas.* 511; *Shepard v. Jones*, 21 Ch. Div. 469, *Kirchwey's Cas.* 514; *Henderson v. Astwood* [1894] App. Cas. 150.

<sup>179</sup> See post, § 554.

<sup>180</sup> *Mickles v. Dillaye*, 17 N. Y. 80, *Kirchwey's Cas.* 526; *Morgan v. Walbridge*, 56 Vt. 405, *Kirchwey's Cas.* 539; *Hicklin v. Marco*, 46 Fed. 424; *Ensign v. Batterson*, 68 Conn. 298; *Bradley v. Merrill*, 88 Me. 319; *Gillis v. Martin*, 17 N. C. 470, 25 Am. Dec. 729; *McSorley v. Larissa*, 100 Mass. 270; *Millard v. Truax*, 73 Mich. 381; *Harper's Appeal*, 64 Pa. St. 315; *Bacon v. Cottrell*, 13 Minn. 194 (Gil. 183); *Hadley v. Stewart*, 65 Wis. 481. But see *Miller v. Curry*, 124 Ind. 48.

<sup>181</sup> See ante, § 241.

<sup>182</sup> *Royal Ins. Co. v. Stinson*, 103 U. S. 29; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69;

the mortgage be for such value.<sup>183</sup> His insurable interest continues even after foreclosure, and until his right to redeem is barred;<sup>184</sup> and his mere personal liability for the debt gives him an insurable interest, even when he has conveyed the mortgaged land to another.<sup>185</sup>

If, as is usually the case, the mortgagor, in compliance with stipulations in the mortgage, takes out insurance for the mortgagee's benefit, or assigns his policy to the mortgagee, the latter is entitled to the proceeds of the insurance to the extent of the mortgage debt, and has an equitable lien thereon.<sup>186</sup> But if the insurance is taken out by the mortgagor purely for his own account, in the absence of any agreement in that regard with the mortgagee, the latter has no claim on the proceeds.<sup>187</sup>

*Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Guest v. New Hampshire Fire Ins. Co.*, 66 Mich. 98.

The giving of a mortgage does not involve breach of a condition in the insurance policy against alienation. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. St. Rep. 582; *Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 44 Am. St. Rep. 859.

<sup>183</sup> *Royal Ins. Co. v. Stinson*, 103 U. S. 25; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448.

<sup>184</sup> *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *Stephens v. Illinois Mut. Fire Ins. Co.*, 43 Ill. 327; *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401; *Richland County Mut. Ins. Co. v. Sampson*, 38 Ohio St. 672.

<sup>185</sup> *Waring v. Loder*, 53 N. Y. 581.

<sup>186</sup> *Wheeler v. Factors' & Traders' Ins. Co.*, 101 U. S. 439; *Thomas' Adm'r's v. Vonkapff's Ex'rs*, 6 Gill & J. (Md.) 372; *In re Sands Ale Brewing Co.*, 3 Biss. 175, Fed. Cas. No. 12,307; *Ames v. Richardson*, 29 Minn. 330; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Miller v. Aldrich*, 31 Mich. 408; *Nichols v. Baxter*, 5 R. I. 491; *Williamson v. Michigan F. & M. Ins. Co.*, 86 Wis. 393, 39 Am. St. Rep. 906; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42, 4 Am. Rep. 641.

<sup>187</sup> *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Pet. (U. S.) 507; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) (1208)

## — By the mortgagee.

The mortgagee also has an insurable interest,<sup>188</sup> but only to the amount of the mortgage debt;<sup>189</sup> and this interest continues till the mortgage debt is paid, or the land passes into other hands by foreclosure.<sup>190</sup> The mortgagee's right to the proceeds of the insurance taken out by him is not affected by the fact that the property is still, even after the loss insured against, sufficient security for the amount of the mortgage.<sup>191</sup> The interests of the mortgagor and mortgagee are so distinct that both may be insured at the same time.<sup>192</sup>

495; *Hancox v. Fishing Ins. Co.*, 3 Sumn. 132, Fed. Cas. No. 6,013; *Plimpton v. Farmers' Mut. Fire Ins. Co.*, 43 Vt. 497; *Vandegraaff v. Medlock*, 3 Port. (Ala.) 389, 29 Am. Dec. 256; *Ryan v. Adamson*, 57 Iowa, 30; *Ames v. Richardson*, 29 Minn. 330; *Nichols v. Baxter*, 5 R. I. 491; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, 2 Am. St. Rep. 219.

<sup>188</sup> *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542; *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683; *Grevenmeyer v. Southern Mut. Fire Ins. Co.*, 62 Pa. St. 340, 1 Am. Rep. 420; *Clark v. Washington Ins. Co.*, 100 Mass. 509, 1 Am. Rep. 135; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544; *National Bank of D. O. Mills & Co. v. Union Ins. Co. of San Francisco*, 88 Cal. 497, 22 Am. St. Rep. 324.

<sup>189</sup> *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 499; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253, 55 Am. Dec. 546; *Hadley v. New Hampshire Ins. Co.*, 55 N. H. 110.

<sup>190</sup> *National Bank of D. O. Mills & Co. v. Union Ins. Co. of San Francisco*, 88 Cal. 497, 22 Am. St. Rep. 324; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683.

His insurable interest continues even after his assignment of the note, if he is liable as an indorser on the mortgage note. *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377, 9 Am. Rep. 41.

<sup>191</sup> *Foster v. Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.) 216; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253, 55 Am. Dec. 546; *Aetna Ins. Co. of Hartford v. Baker*, 71 Ind. 102.

<sup>192</sup> *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.)



If there is no provision in the mortgage requiring the mortgagor to insure the premises, or other agreement on the subject, insurance effected by the mortgagee is purely for his own account, and in case of loss he is entitled to the proceeds of insurance free from any claim by the mortgagor to have it applied on the mortgage debt.<sup>193</sup> If, however, the mortgagee insures the property on account of the mortgagor, or by his request, or at his expense, because the latter fails to comply with his covenant to insure, the proceeds of the policy must be applied on the mortgage debt.<sup>194</sup>

In most states it is held that, upon receipt of the proceeds of insurance by the mortgagee, the insurance company becomes subrogated to the rights of the mortgagee to the extent of the amount thus paid, the mortgagee not being allowed the proceeds of both the mortgage and insurance.<sup>195</sup>

495; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69; *Manson v. Phoenix Ins. Co.*, 64 Wis. 26, 54 Am. Rep. 573.

<sup>193</sup> *Russell v. Southard*, 12 How. (U. S.) 139; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Stinchfield v. Milliken*, 71 Me. 567; *McIntire v. Plaisted*, 68 Me. 363; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *White v. Brown*, 2 Cush. (Mass.) 412.

<sup>194</sup> *Waring v. Loder*, 53 N. Y. 581; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Concord Union Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Nichols v. Baxter*, 5 R. I. 491.

<sup>195</sup> *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Concord Union Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447. In Massachusetts the contrary view is taken,—that the mortgagee may recover both the proceeds of insurance and the full amount of the mortgage. *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1; *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen (Mass.) 123.



## § 524. Injuries to the land—Remedies of the mortgagee.

The owner of land subject to a mortgage may do such acts thereon, even though these involve the cutting of timber or severance of other parts of the realty, as are incident to the use, occupation, or improvement of the land in the ordinary manner, and for the purposes for which such land is ordinarily used;<sup>196</sup> but he cannot so use the land as to substantially impair the value of the premises as security by cutting timber, removing buildings, and the like, this being regarded as waste on his part.<sup>197</sup> Such commission of waste by him, if calculated to render the security of questionable sufficiency, but not otherwise, will be restrained by injunction at the suit of the holder of the mortgage.<sup>198</sup>

In a few states it seems that the mortgagee's only remedy for such acts by the mortgagor is by injunction, and that he cannot recover at law for any waste or injury to the land.<sup>199</sup> In most of the states, however, although the legal

<sup>196</sup> *Judkins v. Woodman*, 81 Me. 351; *Smith v. Moore*, 11 N. H. 55; *Hapgood v. Blood*, 11 Gray (Mass.) 400; *Wright v. Lake*, 30 Vt. 206; *Angier v. Agnew*, 98 Pa. St. 587, 42 Am. Rep. 624; *Hoskin v. Woodward*, 45 Pa. St. 42; *Searle v. Sawyer*, 127 Mass. 491, 34 Am. Rep. 425, *Kirchwey's Cas.* 427; *In re Phillips*, 16 Ch. Div. 104.

<sup>197</sup> *Simmins v. Shirley*, 6 Ch. Div. 173; *Maples v. Millon*, 31 Conn. 598; *Dorr v. Dudderar*, 88 Ill. 107; *Langdon v. Paul*, 22 Vt. 205; *Sanders v. Reed*, 12 N. H. 558; *Wilmarth v. Bancroft*, 10 Allen (Mass.) 348. But that he can cut timber or take minerals, see *Hoskin v. Woodward*, 45 Pa. St. 44; *Angier v. Agnew*, 98 Pa. St. 587, 42 Am. Rep. 624.

<sup>198</sup> *King v. Smith*, 2 Hare, 239, *Kirchwey's Cas.* 410; *Buckout v. Swift*, 27 Cal. 434, 87 Am. Dec. 90; *Coker v. Whitlock*, 54 Ala. 180; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147; *Moriarty v. Ashworth*, 43 Minn. 1, 19 Am. St. Rep. 203; *Webster v. Peet*, 97 Mich. 326; *Verner v. Betz*, 46 N. J. Eq. 256, 19 Am. St. Rep. 387; *State Sav. Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310; *Fairbank v. Cudworth*, 33 Wis. 358; *Dorr v. Dudderar*, 88 Ill. 107; *Minneapolis Trust Co. v. Verhulst*, 74 Ill. App. 350.

<sup>199</sup> *Cooper v. Davis*, 15 Conn. 556, *Kirchwey's Cas.* 416; *Vanderlice v. Knapp*, 20 Kan. 647; *Tomlinson v. Thompson*, 27 Kan. 70. See

title is not in the mortgagee, he has a right of action against either the owner of the mortgaged land<sup>200</sup> or a third person<sup>201</sup> for injury to his security by acts of spoliation on the land.

In most of the states where the mortgagee has the legal title, accompanied by the right of possession, he has usually the remedies incident to such title or right. He may, it has been held, recover in trespass *quare clausum fregit* against one injuring the land;<sup>202</sup> and when timber or fixtures are removed from the land, his title thereto is not affected by the wrongful severance, and he may recover their value in an action of trover or trespass *de bonis asportatis* from the person, whether the owner of the land or another, who committed the wrong,<sup>203</sup> or he may recover the articles them-

Triplett v. Parmlee, 16 Neb. 649. These decisions place the mortgagee rather at the mercy of an unscrupulous mortgagor, and there would seem, on principle, no reason why one injured as regards a proprietary right, even though it be a lien right only, should not have an action of tort against the person committing the injury.

<sup>200</sup> Jackson v. Turrell, 39 N. J. Law, 329; Carpenter v. Cincinnati & Whitewater Canal Co., 35 Ohio St. 307; Lavenson v. Standard Soap Co., 80 Cal. 245, 13 Am. St. Rep. 147; Van Pelt v. McGraw, 4 N. Y. 110, Kirchwey's Cas. 421; Searle v. Sawyer, 127 Mass. 491, Kirchwey's Cas. 427; Langdon v. Paul, 22 Vt. 205.

<sup>201</sup> Van Pelt v. McGraw, 4 N. Y. 110, Kirchwey's Cas. 421; Webber v. Ramsey, 100 Mich. 58, 43 Am. St. Rep. 429, note; Allison v. McCune, 15 Ohio, 726, 45 Am. Dec. 605; Gooding v. Shea, 103 Mass. 360; Lavenson v. Standard Soap Co., 80 Cal. 245, 13 Am. St. Rep. 147, note; Atkinson v. Hewett, 63 Wis. 396. The mortgagee cannot, however, recover, it has been decided in New York, for injury to the land, as by cutting timber, against one so doing in ignorance of the existence of the mortgage, and under contract with the owner of the land. Wilson v. Maltby, 59 N. Y. 126, Kirchwey's Cas. 424. Compare Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425, Kirchwey's Cas. 427.

<sup>202</sup> Stowell v. Pike, 2 Me. 387, Kirchwey's Cas. 414; Smith v. Goodwin, 2 Me. 173; Leavitt v. Eastman, 77 Me. 117; Sanders v. Read, 12 N. H. 558.

<sup>203</sup> Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425, Kirchwey's Cas. 427; Cole v. Stewart, 11 Cush. (Mass.) 181; Burnside v. Twitch- (1212)

selves in replevin.<sup>204</sup> In some of the states, however, in which the legal title is regarded as in the mortgagee, as well as in those in which the equitable theory prevails, the mortgagee's lien or title is regarded as divested by the severance, so that he cannot assert any rights in the things severed.<sup>205</sup>

Occasionally it is said that there is no right of action as for the injury to the security unless such injury is shown by the existence of a deficiency on foreclosure,<sup>206</sup>—a rule calculated to affect the mortgagee adversely by compelling him to defer his action for damages until after foreclosure. In states where the legal title is in the mortgagee, however, the mortgagee's right of action is independent of the sufficiency of the security, he being entitled to the whole security pledged.<sup>207</sup>

—**Remedies of the mortgagor.**

The mortgagor, if in possession, owes the duty to the mortgagor not to commit waste, and may be restrained from so doing by injunction,<sup>208</sup> and may be required to account for

ell, 43 N. H. 390; *Frothingham v. McKusick*, 24 Me. 403; *Angier v. Agnew*, 98 Pa. St. 587, 42 Am. Rep. 624.

<sup>204</sup> *Dorr v. Dudderar*, 88 Ill. 107. And see *Mosher v. Vehne*, 77 Me. 169; *Searle v. Sawyer*, 127 Mass. 491, *Kirchwey's Cas.* 427.

<sup>205</sup> *Cooper v. Davis*, 15 Conn. 556, *Kirchwey's Cas.* 416; *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Harris v. Bannon*, 78 Ky. 568; *Clark v. Reyburn*, 1 Kan. 281; *Kircher v. Schalk*, 39 N. J. Law, 335; *Peterson v. Clark*, 15 Johns. (N. Y.) 205; *Hamlin v. Parsons*, 12 Minn. 108 (Gil. 59), 90 Am. Dec. 284. Compare *Verner v. Betz*, 46 N. J. Eq. 256, 19 Am. St. Rep. 387.

<sup>206</sup> *Taylor v. McConnell*, 53 Mich. 587; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147. And see *Lane v. Hitchcock*, 14 Johns. (N. Y.) 213; *Gardner v. Heartt*, 3 Denio (N. Y.) 232.

<sup>207</sup> *Byrom v. Chapin*, 113 Mass. 308; *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563. See *Leavitt v. Eastman*, 77 Me. 117. But in *King v. Bangs*, 120 Mass. 514, the fact that the premises were sold under the mortgage for sufficient to pay the debt was held to be admissible in mitigation of damages.

<sup>208</sup> *Farrant v. Lovel*, 3 Atk. 723; *Youle v. Richards*, 1 N. J. Eq. 534, 23 Am. Dec. 722; *Givens v. McCalmont*, 4 Watts (Pa.) 460.

any loss resulting therefrom.<sup>209</sup> He is not, however, liable as for permissive waste in failing to keep the premises in repair, or for improper cultivation of the land, unless he has been guilty of gross negligence in that respect.<sup>210</sup>

### III. THE TRANSFER OF MORTGAGED LAND.

The mortgagor may transfer the mortgaged land to another person, in which case the transferee succeeds to the rights and liabilities of the mortgagor.

The transferee, by an express stipulation to that effect with the mortgagor, may become personally liable for the mortgage debt, and, as regards the latter, he is in such case the principal debtor to the mortgagee, while the mortgagor is surety only. While this change of relation does not effect the right of the mortgagee to enforce the personal obligation of the mortgagor, he is, by some decisions, bound to recognize it. The personal liability of the transferee may usually be enforced by the mortgagor, though in some states this can be done in equity only.

The transferee of land who agrees to pay the mortgage, or takes a transfer expressly stating that the land is subject to the mortgage, cannot question the validity of the mortgage.

In case of the transfer of different parts of the land at different times by conveyances which do not impose any obligation on the transferees of paying the mortgage, and which do, by reason of covenants for title or otherwise, impose such obligation on the transferrer, the parts are liable to the enforcement of the mortgage lien in the inverse order of alienation.

#### § 525. General considerations.

The mortgagor may, as before stated, convey or devise the mortgaged land, it may be sold on execution, and it passes,

<sup>209</sup> *Sandon v. Hooper*, 6 Beav. 246, *Kirchwey's Cas.* 511; *Perdue v. Brooks*, 85 Ala. 459.

<sup>210</sup> *Russel v. Smithies*, 1 Anstr. 96, *Kirchwey's Cas.* 507; *Wragg v. Denham*, 2 Younge & C. 117, *Kirchwey's Cas.* 507; *Dexter v. Arnold*, 2 Sumn. 108, *Fed. Cas. No.* 3,858, *Kirchwey's Cas.* 522.



on his death intestate, to his heirs, or to his personal representatives, if his estate is less than freehold. The grantee, devisee, heir, or personal representative takes the land subject to the mortgage, but with the rights of the mortgagor. He may redeem from the mortgage,<sup>211</sup> and may require a mortgagee in possession to account for the rents and profits.<sup>212</sup> He stands generally in the same position as regards the mortgage on the land as did his predecessor in interest, and he has no greater rights, since the rights of the mortgagee cannot be impaired by a transfer of the land.

— Transfer to mortgagee.

After the making of the mortgage, the mortgagor and mortgagee may deal with each other as any other individuals, and a conveyance or release by the mortgagor to the mortgagee of his interest in the mortgaged land is valid, provided, in view of the peculiar relation of the parties, the absence of circumstances of fraud and oppression is clearly shown.<sup>213</sup> Occasionally it is stated that such a transfer by

<sup>211</sup> See post, § 541.

<sup>212</sup> *Strang v. Allen*, 44 Ill. 428; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364; *Long v. Richards*, 170 Mass. 120; *Ruckman v. Astor*, 9 Paige (N. Y.) 517.

<sup>213</sup> *Peugh v. Davis*, 96 U. S. 332; *Seymour v. Mackay*, 126 Ill. 341; *Wynkoop v. Cowing*, 21 Ill. 570; *Baugher v. Merryman*, 32 Md. 185; *Trull v. Skinner*, 17 Pick. (Mass.) 213, *Kirchwey's Cas.* 445; *Odell v. Montross*, 68 N. Y. 499, *Kirchwey's Cas.* 460; *Shaw v. Walbridge*, 33 Ohio St. 1; *Hall v. Hall*, 41 S. C. 163, 44 Am. St. Rep. 696; *Green v. Butler*, 26 Cal. 595, *Kirchwey's Cas.* 448.

Such a conveyance by a mortgagor to the mortgagee, which takes effect, strictly speaking, by way of release, is to be distinguished from an attempted release or waiver by the mortgagor of the right to redeem. The statement quite frequently made, that the mortgagor may release his equity of redemption by an agreement, subsequent to the mortgage, but not contemporaneous therewith, seems to involve a confusion of thought, arising from the double use of the term "equity of redemption." See ante, note 7. The time of the transaction is immaterial. The mortgagor cannot waive his right of re-



the mortgagor to the mortgagee must be supported by an adequate consideration,<sup>214</sup> but in other cases this is denied, and it would seem that this requirement, so far as it exists, merely means that the fact that the mortgagor could obtain a higher price from another purchaser is strong, if not conclusive, evidence of fraud or oppression.<sup>215</sup> Such subsequent transfer, moreover, though absolute in form, may, like any other absolute transfer, be shown not to be so intended, but to be merely for the purpose of enabling the mortgagee to secure his debt.<sup>216</sup>

### § 526. Personal liability of the transferee.

The mortgagor's transferee is not personally liable for the mortgage debt unless he expressly or impliedly agrees to pay it, though the land is always liable for the amount of the mortgage, provided the transferee has actual or constructive notice of its existence.<sup>217</sup> And so the fact that the land

demption by an agreement contemporaneous with or subsequent to the mortgage, because a mortgage without the right of redemption is not recognized by the courts. He may, however, convey the land to the mortgagee,—not, of course, contemporaneously with the mortgage, because that would be impossible, but subsequently thereto,—and this he can do for the simple reason that he is owner of the land.

<sup>214</sup> *Villa v. Rodriguez*, 12 Wall. (U. S.) 323, *Kirchwey's Cas.* 453; *Odell v. Montross*, 68 N. Y. 499, *Kirchwey's Cas.* 460; *Linnell v. Lyford*, 72 Me. 280; *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171. The transfer "must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity." *Peugh v. Davis*, 96 U. S. 332.

<sup>215</sup> That the consideration need not be adequate, see *Coote, Mortgages*, 21; *Waters v. Groom*, 11 Clark & F. 684; *De Martin v. Phelan* 115 Cal. 538, *Kirchwey's Cas.* 465; *West v. Reed*, 55 Ill. 242. See *Hicks v. Hicks*, 5 Gill & J. (Md.) 75; *Trull v. Skinner*, 17 Pick. (Mass.) 213, *Kirchwey's Cas.* 445.

<sup>216</sup> *Vernon v. Bethell*, 2 Eden, 110; *Villa v. Rodriguez*, 12 Wall. (U. S.) 323, *Kirchwey's Cas.* 453; *Tower v. Fetz*, 26 Neb. 706, 18 Am. St. Rep. 795; *Baughner v. Merryman*, 32 Md. 185. See, ante, § 512.

<sup>217</sup> *Strong v. Converse*, 8 Allen (Mass.) 557, 85 Am. Dec. 732; *Com-* (1216)

is in terms conveyed "subject to" the mortgage imposes no personal liability on him.<sup>218</sup>

An agreement by the grantee to pay the mortgage, or a statement that he assumes it, makes him personally liable for the amount thereof.<sup>219</sup> In order thus to impose a personal liability on him by reason of a clause in the conveyance, it is not necessary that the grantee himself sign the conveyance, its acceptance by him being regarded as sufficient.<sup>220</sup> Even though there is no clause in the conveyance imposing a personal liability upon the transferee, he may assume such liability by a collateral agreement, either writ-

stock v. Hitt, 37 Ill. 542; Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659; Fowler v. Fay, 62 Ill. 375; Lewis v. Day, 53 Iowa, 575; Tanguay v. Felthousen, 45 Wis. 30; Elliott v. Sackett, 108 U. S. 132; Hall v. Mobile & M. Ry. Co., 58 Ala. 10; Green v. Hall, 45 Neb. 89; Guernsey v. Kendall, 55 Vt. 201; Gerdine v. Menage, 41 Minn. 417.

<sup>218</sup> Elliott v. Sackett, 108 U. S. 132; Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659; Lewis v. Day, 53 Iowa, 575; Shepherd v. May, 115 U. S. 505; Moore's Appeal, 88 Pa. St. 450; Dunn v. Rodgers, 43 Ill. 260; Post v. Tradesmen's Bank, 28 Conn. 420; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Green v. Turner, 38 Iowa, 112; Woodbury v. Swan, 58 N. H. 380; Bennett v. Bates, 94 N. Y. 354; Green v. Hall, 45 Neb. 89; Tanguay v. Felthousen, 45 Wis. 30; Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213.

<sup>219</sup> Farmers' Nat. Bank v. Gates, 33 Or. 388, 72 Am. St. Rep. 724; Campbell v. Smith, 71 N. Y. 26, 27 Am. Rep. 5; Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Keller v. Ashford, 133 U. S. 610; Taylor v. Whitmore, 35 Mich. 97; Taylor v. Preston, 79 Pa. St. 436; Birke v. Abbott, 103 Ind. 1, 53 Am. Rep. 474; Rice v. Sanders, 152 Mass. 108, 23 Am. St. Rep. 804; Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577.

<sup>220</sup> Finley v. Simpson, 22 N. J. Law, 311, 53 Am. Dec. 252; Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Davis v. Hulett, 58 Vt. 90; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556; Bowen v. Beck, 94 N. Y. 86, 46 Am. Rep. 124; Keller v. Ashford, 133 U. S. 610; Crawford v. Edwards, 33

(1217)

ten or oral;<sup>221</sup> and, according to a number of decisions, such an agreement is implied from the fact that, when a purchaser has agreed to pay a particular sum for the mortgaged land, the amount of the mortgage is deducted from this sum in fixing the amount actually paid by him, and the land is conveyed to him subject to the mortgage.<sup>222</sup>

**§ 527. Mortgagor becoming surety.**

Upon the assumption of the mortgage debt by the transferee, he becomes, according to the current of authority, as regards the transferrer, the principal debtor, while the mortgagor becomes a surety merely for its payment.<sup>223</sup> The mortgagee's right of action to enforce the personal liability of the mortgagor is not affected by the fact that, as between the parties to the transfer, the mortgagor is surety only.<sup>224</sup> But he is, according to a number of decisions, bound to rec-

Mich. 354; *O'Conner v. O'Conner*, 88 Tenn. 76; *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq. 504; *Bishop v. Douglass*, 25 Wis. 696.

<sup>221</sup> *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Strohauer v. Voltz*, 42 Mich. 444; *Merriman v. Moore*, 90 Pa. St. 78; *Wright v. Briggs*, 99 Ind. 563; *Bowen v. Kurtz*, 37 Iowa, 239; *Bolles v. Beach*, 22 N. J. Law, 680, 53 Am. Dec. 263; *Society of Friends v. Haines*, 47 Ohio St. 423.

<sup>222</sup> *Twitchell v. Mears*, 8 Biss. 211, Fed. Cas. No. 14,286; *Townsend v. Ward*, 27 Conn. 610; *Comstock v. Hitt*, 37 Ill. 542; *Bristol Sav. Bank v. Stiger*, 86 Iowa, 344; *Tichenor v. Dodd*, 4 N. J. Eq. 454; *Herd v. Vreeland*, 30 N. J. Eq. 591; *Rockwell v. Blair Sav. Bank*, 31 Neb. 128, as explained in *Green v. Hall*, 45 Neb. 89; *Thompson v. Thompson*, 4 Ohio St. 333. But see *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Bennett v. Bates*, 94 N. Y. 354; *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659; *Granger v. Roll*, 6 S. D. 611; *Moore's Appeal*, 88 Pa. St. 450.

<sup>223</sup> *Boardman v. Larrabee*, 51 Conn. 39; *Flagg v. Geltmacher*, 98 Ill. 293; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Ellis v. Johnson*, 96 Ind. 377; *Willson v. Burton*, 52 Vt. 394; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Metz v. Todd*, 36 Mich. 473.

<sup>224</sup> *Flagg v. Geltmacher*, 98 Ill. 293; *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755; *Merriam v. Miles*, 54 Neb. 566, 69 Am. St. Rep. 731; *Poe v. Dixon*, 60 Ohio St. 124, 71 Am. St. Rep. 713.

ognize this new relation of principal and surety in his dealings with the principal,—that is, the transferee,—and consequently the mortgagor as surety is discharged from his personal liability in case the mortgagee, after knowledge of the transfer and the terms thereof, extends the time of payment in favor of the transferee, or makes other material concessions to him.<sup>225</sup> By other decisions, the mortgagee must in some way recognize this new relation of principal and surety in order that he may be affected thereby.<sup>226</sup>

§ 528. Enforcement of personal liability by transferee.

The transferee of the premises who agrees to pay the mortgage is, by the weight of authority, liable directly to the mortgagee, who may recover by virtue of the agreement, though not a party thereto. This right of recovery by the mortgagee is sometimes based upon the theory that a person for whose benefit a contract is made may sue thereon, and that the mortgagee may accordingly sue the transferee at law.<sup>227</sup> In other cases the mortgagee's right of recovery against the transferee is based on the theory that since, by

<sup>225</sup> *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Paine v. Jones*, 76 N. Y. 274; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755; *Union Stove & Mach. Works v. Caswell*, 48 Kan. 689, 16 L. R. A. 85; *Merriam v. Miles*, 54 Neb. 566, 69 Am. St. Rep. 731. See 15 Harv. Law Rev. 398.

<sup>226</sup> *Shepherd v. May*, 115 U. S. 505; *Boardman v. Larrabee*, 51 Conn. 39; *Corbett v. Waterman*, 11 Iowa, 87.

<sup>227</sup> *Thorpe v. Keokuk Coal Co.*, 48 N. Y. 253; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Gilbert v. Sanderson*, 56 Iowa, 349, 41 Am. Rep. 103; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Gifford v. Corrigan*, 117 N. Y. 257; *Urquhart v. Brayton*, 12 R. I. 169; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Follansbee v. Johnson*, 28 Minn. 311; *Poe v. Dixon*, 60 Ohio St. 133, 71 Am. St. Rep. 713; *Merriman v. Moore*, 90 Pa. St. 78; *Enos v. Sanger*, 96 Wis. 150, 65 Am. St. Rep. 38. See cases collected, 15 Harv. Law Rev. 808.



his agreement to pay the mortgage, the transferee becomes the principal debtor, and his grantor the surety, and since, in equity, a creditor is entitled to be subrogated to any security which the surety has for his indemnity, the mortgagee is subrogated to the right of the mortgagor against the transferee.<sup>228</sup>

When the assumption of the mortgage is not by a transferee of the land, but by a second mortgagee, his promise to pay cannot be regarded as a promise to pay his own debt, nor as a contract to indemnify the mortgagor against liability thereon, as it is in the case of an absolute conveyance, but it is in effect a mere promise to advance the amount of the prior mortgage to the mortgagor, and there is no right of recovery against such second mortgagee in favor of the first mortgagee.<sup>229</sup>

Until the mortgagee has in some manner accepted the as-

<sup>228</sup> *Keller v. Ashford*, 133 U. S. 610; *Osborne v. Cabell*, 77 Va. 462; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Biddel v. Brizzolara*, 64 Cal. 354; *Miller v. Thompson*, 34 Mich. 10; *Wager v. Link*, 134 N. Y. 122; *Hopkins v. Warner*, 109 Cal. 136. See the discussion of the subject in article by Samuel Williston, Esq., in 15 Harv. Law Rev. 767, 787, on "Contracts for the Benefit of a Third Person."

Since, on this theory, the mortgagee's right of recovery arises from the liability of the grantor, there is no such right if the grantor is under no liability, as when the clause assuming the mortgage is in a deed from a grantee of the mortgagor, who was not himself liable. *Ward v. De Oca*, 120 Cal. 102; *Osborne v. Cabell*, 77 Va. 462; *Trotter v. Hughes*, 12 N. Y. 74; *Wise v. Fuller*, 29 N. J. Eq. 257, 266. See 15 Harv. Law Rev. 104. When the mortgagee's right of recovery exists at law, it would seem that the nonliability of the grantor is immaterial. *Dean v. Walker*, 107 Ill. 541, 47 Am. Rep. 467; *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436; *Merriman v. Moore*, 90 Pa. St. 78; *Hare v. Murphy*, 45 Neb. 809; *Enos v. Sanger*, 96 Wis. 151, 65 Am. St. Rep. 38. But see *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Brown v. Stillman*, 43 Minn. 126.

<sup>229</sup> *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Bassett v. Bradley*, 48 Conn. 234; *Pardee v. Treat*, 82 N. Y. 385. See *Gaffney v. Hicks*, 131 Mass. 124.

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sumption of the mortgage debt by the transferee of the land, the mortgagor may, it seems, release the transferee from his contract of assumption,<sup>230</sup> and, according to some cases, this may be done even after such acceptance by the mortgagee.<sup>231</sup>

§ 529. The transferee's right to question mortgage.

The transferee assuming the mortgage cannot show that it is invalid, or that it is not all due, since the full amount of the mortgage was deducted in fixing the purchase price paid by him, and the mortgagor thereby devoted that portion of the price to the payment of the mortgage,<sup>232</sup> and the same rule applies when the property is conveyed without any clause of assumption, but expressly subject to the mortgage.<sup>233</sup>

§ 530. Transfer of part of land.

In case distinct portions of the land are conveyed to different persons by simultaneous and similar conveyances, and

<sup>230</sup> *Carnahan v. Tousey*, 93 Ind. 561; *Gilbert v. Sanderson*, 56 Iowa, 349, 41 Am. Rep. 103; *Gifford v. Corrigan*, 105 N. Y. 223, 15 Am. St. Rep. 508; *Jones v. Higgins*, 80 Ky. 409. But that the grantee's liability on his contract of assumption cannot be released by the grantor, see *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; 3 *Pomeroy*, Eq. Jur. § 1206, p. 1846, note.

<sup>231</sup> *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *O'Neill v. Clark*, 33 N. J. Eq. 444; *Biddel v. Brizzolara*, 64 Cal. 354.

<sup>232</sup> *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268; *Ritter v. Phillips*, 53 N. Y. 586; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Clapp v. Halliday*, 48 Ark. 258; *Crawford v. Edwards*, 33 Mich. 354; *Fitzgerald v. Barker*, 85 Mo. 13; *De Wolf v. Johnson*, 10 Wheat. (U. S.) 367; *Hough v. Horsey*, 36 Md. 181, 11 Am. Rep. 484; *Cramer v. Lepper*, 26 Ohio St. 59, 20 Am. Rep. 756; *Skinner v. Reynick*, 10 Neb. 323, 35 Am. Rep. 479.

<sup>233</sup> *Sweetzer v. Jones*, 35 Vt. 317; *Riley v. Rice*, 40 Ohio St. 441; *Green v. Turner*, 38 Iowa, 112; *Sands v. Church*, 6 N. Y. 347; *Maher v. Lanfrom*, 86 Ill. 513; *Freeman v. Auld*, 44 N. Y. 50; *Pratt v. Nixon*, 91 Ala. 192; *Johnson v. Thompson*, 129 Mass. 398; *Alt. v. Banholzer*, 36 Minn. 57. See *Bennett v. Bates*, 94 N. Y. 354.

there is in no one of such conveyances a clause by which the transferee assumes the mortgage, each portion is liable for a part of the mortgage debt, proportioned to the value of his portion of the land, and, if one such person pays an amount greater than his proportional share, he is entitled to contribution from the owners of the other portions.<sup>234</sup>

This requirement of proportional contribution is, however, frequently modified in consideration of the equities of the case. The most ordinary instance of such equitable modification of the rule occurs when the original mortgagor, or a subsequent owner of the whole, has transferred part of the mortgaged land to one person, either retaining the residue, or transferring it subsequently to another. If the owner transfers a part of the land by warranty deed or its equivalent, and retains the residue, it is considered equitable that the part retained should be liable for the whole incumbrance, rather than that payment should be partly imposed on the part transferred; and if the transferee pays the mortgage debt, he is entitled to contribution from the grantor to the extent of the value of the land retained, and, if this exceeds the debt, to complete exoneration.<sup>235</sup> On the other hand, if the original owner pays the amount of the mortgage, since

<sup>234</sup> 3 Pomeroy, Eq. Jur. § 1222; *Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Bailey v. Myrick*, 50 Me. 171; *Hall v. Morgan*, 79 Mo. 47; *Brown v. Simons*, 44 N. H. 475; *Alley v. Rogers*, 19 Grat. (Va.) 366.

So, if one tenant in common pays a greater part of the mortgage debt than is proportioned to his interest in the land, he is entitled to contribution from the other tenants in common. *Simpson v. Gardiner*, 97 Ill. 237; *Lyon v. Robbins*, 45 Conn. 513.

<sup>235</sup> *Aldrich v. Cooper*, 2 White & T. Lead. Cas. Eq. p. 291 et seq., notes; *Lock v. Fulford*, 52 Ill. 166; *Windsor v. Evans*, 72 Iowa, 692; *Cumming v. Cumming*, 3 Ga. 460; *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 235; *Engle v. Haines*, 5 N. J. Eq. 186, 43 Am. Dec. 624; *Caruthers v. Hall*, 10 Mich. 40.

this is merely a compliance with his legal obligation, he cannot demand any contribution from his transferee.<sup>236</sup>

If, after having thus conveyed part of the mortgaged land, the original owner conveys the part retained to another person, the second transferee stands in his place, and, as against the prior transferee, the land last transferred is liable for the mortgage debt. If, instead of transferring the whole of the land retained by him, the original owner transfers a part thereof only, the part still retained by him is equitably first liable for the whole debt, and, if that is insufficient, then the part last transferred should be charged for the deficiency, rather than that first transferred, since the second transferee took the land in the same condition in which it was in the hands of the grantor. Thus, the different parts of the mortgaged land are liable "in the inverse order of alienation."<sup>237</sup> In two or three states only does a contrary rule prevail, to the effect that transferees at different times are liable in proportion to the amount of their interests.<sup>238</sup>

Since this doctrine of liability in the inverse order of alienation arises from the obligation of the common grantor, as against the various grantees, to pay off the mortgage, it does not arise when no such obligation exists. Consequently, if the transferee assumes payment of the mortgage, the gran-

<sup>236</sup> *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Pollard v. Noyes*, 60 N. H. 184; *Henderson v. Truitt*, 95 Ind. 309; 3 *Pomeroy*, Eq. Jur. § 1224; 2 *Jones*, Mortgages, § 1090. See post, § 545.

<sup>237</sup> *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 235; *Cumming v. Cumming*, 3 Ga. 460; *George v. Wood*, 9 Allen (Mass.) 80, 85 Am. Dec. 741; *Crosby v. Farmers' Bank of Andrew County*, 107 Mo. 436; *Brown v. Simons*, 44 N. H. 475; *Cheever v. Fair*, 5 Cal. 337; *Sternberger v. Hanna*, 42 Ohio St. 305; *Miller v. Rogers*, 49 Tex. 398; *Iglehart v. Crane*, 42 Ill. 261; *Ireland v. Woolman*, 15 Mich. 253; *Sanford v. Hill*, 46 Conn. 42; *Sheperd v. Adams*, 32 Me. 63; *Cowden's Estate*, 1 Pa. St. 267; *Lyman v. Lyman*, 32 Vt. 79, 76 Am. Dec. 151.

<sup>238</sup> *Dickey v. Thompson*, 8 B. Mon. (Ky.) 312; *Bates v. Ruddick*, 2 Iowa, 423; *Barney v. Myers*, 28 Iowa, 472.

tee's land becomes primarily liable for the mortgage debt;<sup>239</sup> and the same result follows if the transfer is expressly "subject" to the mortgage,<sup>240</sup> and in such cases the grantor and his subsequent transferees are entitled to contribution or exoneration at the expense of the grantee's land. Moreover, the doctrine is not applied in case the prior conveyance by the original owner is not a warranty deed, or otherwise such a conveyance as to render it the duty of such owner to discharge the mortgage.<sup>241</sup> Although the transferee be otherwise entitled to have the land of a subsequent transferee first applied upon the mortgage, he may lose this right by failure to record his transfer, if the result is that the subsequent transferee takes without notice of the previous transfer, and of the consequent increased burden on the land transferred to him;<sup>242</sup> and the rule may be made inapplicable by a stipulation between the persons interested, charging the mortgage upon the land in a different manner.<sup>243</sup>

The mortgagee, if he has notice of the transfer of a part or parts of the mortgaged land, cannot release any part, to

<sup>239</sup> *Thompson v. Bird*, 57 N. J. Eq. 175; *Bowne v. Lynde*, 91 N. Y. 92; *Drury v. Holden*, 121 Ill. 130; *Welch v. Beers*, 8 Allen (Mass.) 151.

<sup>240</sup> 3 *Pomeroy*, Eq. Jur. §§ 1205, 1225; *Engle v. Haines*, 5 N. J. Eq. 186; *Johnson v. Zink*, 51 N. Y. 333; *Sweetzer v. Jones*, 35 Vt. 317, 82 Am. Dec. 639; *Briscoe v. Power*, 47 Ill. 447; *Burger v. Grief*, 55 Md. 518; *Carpenter v. Koons*, 20 Pa. St. 222.

<sup>241</sup> 3 *Pomeroy*, Eq. Jur. § 1225; 2 *White & T. Lead. Cas. Eq.* (4th Am. Ed.) 296, 303; *Aiken v. Gale*, 37 N. H. 501; *Carpenter v. Koons*, 20 Pa. St. 222; *Erlinger v. Boul*, 7 Ill. App. 40; *Aderholt v. Henry*, 87 Ala. 415; *Steinmeyer v. Steinmeyer*, 55 S. C. 9. See *In re Jones* [1893] 2 Ch. 461.

<sup>242</sup> 3 *Pomeroy*, Eq. Jur. § 1225; 2 *White & T. Lead. Cas. Eq.* 297; *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Brown v. Simons*, 44 N. H. 475; *Hunt v. Mansfield*, 31 Conn. 488.

<sup>243</sup> *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687; *Hopkins v. Wolley*, 81 N. Y. 77; *Zabriskie v. Salter*, 80 N. Y. 555; *Moore v. Shurtleff*, 128 Ill. 370; *Mickle v. Maxfield*, 42 Mich. 304.



the injury of the owners of other parts, and, by a release of a part which is either concurrently or primarily liable, he to that extent extinguishes the lien. So, when the several parts in the hands of different grantees are liable in proportion to their value, as having been conveyed by concurrent and similar conveyances, a release of one part extinguishes the mortgage lien in favor of the other parts, to the extent to which such part would be liable, measured by its proportional value;<sup>244</sup> and so, when a part primarily liable, as having been last transferred, is released, the lien is extinguished to the extent of the value of the land so released.<sup>245</sup>

#### IV. THE TRANSFER OF A MORTGAGE.

A mortgage may, except in rare cases, be transferred by the mortgagee. The transfer may be by an express writing to that effect, or may be by a mere assignment of the debt secured by the mortgage. An assignment of the mortgage without the debt vests in the transferee, at most, a bare legal title, which he holds in trust for the owner of the debt.

An assignment of a mortgage must generally be recorded in order to be effective as against one claiming under a subsequent transfer or release of the mortgage by the mortgagee.

#### § 531. Express transfer of mortgage.

The form of transfer or assignment of a mortgage differs greatly in the different states, a concise form being frequently specified by statute as sufficient. Generally, as will

<sup>244</sup> 3 Pomeroy, Eq. Jur. § 1226; *Taylor v. Short's Adm'r*, 27 Iowa, 361, 1 Am. Rep. 280; *Birnie v. Main*, 29 Ark. 591; *Johnson v. Rice*, 8 Me. 157; *Parkman v. Welch*, 19 Pick. (Mass.) 231; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425; *Deuster v. McCamus*, 14 Wis. 307.

<sup>245</sup> *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Gaskill v. Sine*, 13 N. J. Eq. 400, 78 Am. Dec. 105; *George v. Wood*, 9 Allen (Mass.) 80, 85 Am. Dec. 741; *Paxton v. Harrier*, 11 Pa. St. 312; *Burson v. Blackley*, 67 Tex. 5; *Brown v. Simons*, 44 N. H. 475.



appear hereafter, the mortgage debt, as well as the mortgage, should be expressly assigned, or the evidence thereof delivered, and the assignment should be recorded.

On the common-law theory of the character of a mortgage, which regards the legal title as vested in the mortgagee, the only mode of transferring such title is by a formal conveyance similar to that required in the case of other transfers of estates in land, and, accordingly, such a conveyance is in some states necessary for the transfer of all the rights of the mortgagee.<sup>246</sup> Provided the mortgagee's interest in the land is transferred, the exact form of the conveyance is immaterial, and, accordingly, either a warranty or quitclaim deed, or a deed of release, is sufficient to transfer the legal title, although the mortgage is not specifically referred to.<sup>247</sup>

### § 532. Transfer of mortgage debt.

In addition to the modes of transfer involving an express conveyance of the mortgagee's interest in the land, or an assignment of the mortgage *eo nomine*, there is a mode of assignment, of even greater importance, growing out of the equitable principle that the debt secured is the principal thing, and the mortgage securing it merely an incident. Upon this principle it is recognized, in some states in courts of equity only, but in others in courts of law as well, that an assignment of the debt, however evidenced, effects an assignment of the mortgage, conferring upon the assignee of the

<sup>246</sup> *Douglass v. Durin*, 51 Me. 121; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Warden v. Adams*, 15 Mass. 233, *Kirchwey's Cas.* 626; *Adams v. Parker*, 12 Gray (Mass.) 53; *Torrey v. Deavitt*, 53 Vt. 331; *Sanders v. Cassady*, 86 Ala. 246; *Barrett v. Hinckley*, 124 Ill. 32, 57 Am. St. Rep. 331, *Kirchwey's Cas.* 634; *Williams v. Teachey*, 85 N. C. 402; *Givan v. Doe*, 7 Blackf. (Ind.) 210.

<sup>247</sup> *Welsh v. Phillips*, 54 Ala. 309; *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; *Douglass v. Durin*, 51 Me. 121; *Welch v. Priest*, 8 Allen (Mass.) 165; *Ruggles v. Barton*, 13 Gray (Mass.) 506; *Collamer v. Langdon*, 29 Vt. 32; *Cole v. Edgerly*, 48 Me. 108. (1226)

debt the rights and remedies of the original mortgagee, except in so far as these are based upon a legal title in the mortgagee.<sup>248</sup> And a merely oral assignment of the debt is sufficient to transfer the mortgage under this rule.<sup>249</sup> Such a transfer of the debt cannot, however, in those states in which a legal title to the land is regarded as existent in the mortgage, have the effect of transferring such title,<sup>250</sup> but it will be regarded as held in trust for the transferee of the debt.<sup>251</sup>

### § 533. Transfer of part of debt.

The principle that an assignment of the debt involves an assignment of the mortgage security applies in the case of an assignment of a part only of the debt, which is usually effected by a transfer of one of several notes evidencing the debt, and in such cases the assignee is entitled to share in

<sup>248</sup> *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *Green v. Hart*, 1 Johns. (N. Y.) 580, *Kirchwey's Cas.* 622; *Lawrence v. Knap*, 1 Root (Conn.) 248, 1 Am. Dec. 42, *Kirchwey's Cas.* 621; *Herring v. Woodhull*, 29 Ill. 92, 81 Am. Dec. 296; *Stewart v. Preston*, 1 Fla. 11, 44 Am. Dec. 621; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655; *Morris v. Bacon*, 123 Mass. 58, 25 Am. Rep. 17; *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720; *Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156; *Bank of Indiana v. Anderson*, 14 Iowa, 544, 83 Am. Dec. 390; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393; 3 Pomeroy, Eq. Jur. § 1210.

<sup>249</sup> *Pease v. Warren*, 29 Mich. 9, 18 Am. Rep. 58; *Rigney v. Lovejoy*, 13 N. H. 247; *Pratt v. Bennington Bank*, 10 Vt. 293, 33 Am. Dec. 201; *Fred Miller Brewing Co. v. Manasse*, 99 Wis. 99, 67 Am. St. Rep. 854; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393.

<sup>250</sup> *Cottrell v. Adams*, 2 Biss. 351, Fed. Cas. No. 3,272; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Bailey v. Winn*, 101 Mo. 649; *Young v. Miller*, 6 Gray (Mass.) 152; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, *Kirchwey's Cas.* 634.

<sup>251</sup> *Jordan v. Cheney*, 74 Me. 359; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, *Kirchwey's Cas.* 634; *Crane v. March*, 4 Pick. (Mass.) 131, 16 Am. Dec. 329; *Morris v. Bacon*, 123 Mass. 58, 25 Am. Rep. 17.

the benefit of the mortgage security.<sup>252</sup> When the various notes secured by the mortgage are transferred to different persons, a question arises as to the respective priorities of those persons in case the mortgaged land is not sufficient to pay all the notes in full. In some states the rule has been adopted that, if the notes in the hands of different persons mature at different times, as is usually the case, they are entitled to priority, as regards the benefit of the mortgage, in the order of their maturity.<sup>253</sup> In other states, the assignees of the different notes are entitled to share in the proceeds of the mortgaged land in proportion to the amounts of their respective notes, without reference to the time of their maturity.<sup>254</sup> The rights of the assignees of the notes in this respect may also be controlled by an express stipulation in

<sup>252</sup> *Page v. Pierce*, 26 N. H. 317, *Kirchwey's Cas.* 630; *Sargent v. Howe*, 21 Ill. 148; *Anderson v. Baumgartner*, 27 Mo. 80; *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 500; *Patrick's Appeal*, 105 Pa. St. 356; *Miller v. Rutland & W. R. Co.*, 40 Vt. 399, 94 Am. Dec. 414.

<sup>253</sup> *Grapengether v. Fejervary*, 9 Iowa, 163, 74 Am. Dec. 336; *Isett v. Lucas*, 17 Iowa, 503, 85 Am. Dec. 572; *Wood v. Trask*, 7 Wis. 566, 76 Am. Dec. 230; *Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156; *State Bank v. Tweedy*, 8 Blackf. (Ind.) 447, 46 Am. Dec. 486; *Minor v. Hill*, 58 Ind. 176, 26 Am. Rep. 71; *Winters v. Franklin Bank of Cincinnati*, 33 Ohio St. 250; *Funk v. McReynold's Adm'rs*, 33 Ill. 481; *Wilson v. Hayward*, 6 Fla. 171; *Anderson v. Sharp*, 44 Ohio St. 260.

But even where this rule is recognized, if the mortgage provides that, on default in payment of one of the notes, all shall become due, upon such default all are entitled to share equally. *Bushfield v. Meyer*, 10 Ohio St. 334; *Pierce v. Shaw*, 51 Wis. 316; *Whitehead v. Morrill*, 108 N. C. 65. *Contra*, *Leavitt v. Reynolds*, 79 Iowa, 348; *Horn v. Bennett*, 135 Ind. 158, 24 L. R. A. 800.

<sup>254</sup> *Donley v. Hays*, 17 Serg. & R. (Pa.) 400; *Parker v. Mercer*, 6 How. (Miss.) 320, 38 Am. Dec. 438; *Penzel v. Brookmire*, 51 Ark. 105, 14 Am. St. Rep. 23; *Jennings v. Moore*, 83 Mich. 231, 21 Am. St. Rep. 601; *Perry's Appeal*, 22 Pa. St. 43, 60 Am. Dec. 63; *Dixon v. Clayville*, 44 Md. 573; *Lovell v. Cragin*, 136 U. S. 147; *Eastman v. Foster*, 8 Metc. (Mass.) 15.

the mortgage, or by an agreement made at the time of assigning a note, as to the order of priority.<sup>255</sup>

Occasionally, though not usually, the view has been taken that a mortgagee who assigns one or more of the notes, retaining the balance, cannot claim to share in the benefit of the mortgage security as against his assignee, since he is presumed to have been paid by the latter the value of the notes assigned,<sup>256</sup> and it seems to be agreed that a contract to this effect is to be presumed from the fact that the mortgage is assigned with the notes.<sup>257</sup> Likewise, if the mortgagee is a surety for the payment of the note, he cannot claim a part of the benefit of the mortgage as against his assignee.<sup>258</sup>

#### § 534. Transfer of mortgage without debt.

Even in the states which adhere to the common-law view of a mortgage, the assignment of the mortgage merely, or of the mortgagee's interest in the land, without an assignment of the debt, or of the note or bond evidencing the debt, transfers, at most, the bare legal title, which the assignee will hold in trust for the owner of the debt.<sup>259</sup> In the states which

<sup>255</sup> *Walker v. Dement*, 42 Ill. 272; *Granger v. Crouch*, 86 N. Y. 494; *Morgan v. Kline*, 77 Iowa, 681; *Norton v. Palmer*, 142 Mass. 433; *Ellis v. Lamme*, 42 Mo. 153; *Howard v. Schmidt*, 29 La. Ann. 129; *Chew v. Buchanan*, 30 Md. 367; *McLean's Appeal*, 103 Pa. St. 255.

<sup>256</sup> *Parkhurst v. Watertown Steam Engine Co.*, 107 Ind. 595; *Knight v. Ray*, 75 Ala. 383. Contra, *Dixon v. Clayville*, 44 Md. 573; *Donley v. Hays*, 17 Serg. & R. (Pa.) 400; *Patrick's Appeal*, 105 Pa. St. 356; *Keyes v. Wood*, 21 Vt. 331.

<sup>257</sup> *Bryant v. Damon*, 6 Gray (Mass.) 564; *Foley v. Rose*, 123 Mass. 557; *Langdon v. Keith*, 9 Vt. 300; *Solberg v. Wright*, 33 Minn. 224; *Miller v. Washington Sav. Bank*, 5 Wash. 200.

<sup>258</sup> *Whitehead v. Morrill*, 108 N. C. 65; *Fourth Nat. Bank's Appeal*, 123 Pa. St. 484, 10 Am. St. Rep. 538.

<sup>259</sup> *Welsh v. Phillips*, 54 Ala. 309, 25 Am. Rep. 679; *Farrell v. Lewis*, 56 Conn. 280; *Sanger v. Bancroft*, 12 Gray (Mass.) 365; *Williams v. Teachey*, 85 N. C. 402; *Collamer v. Johnson*, 29 Vt. 32; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, *Kirchwey's Cas.* 634.

A transfer by the mortgagee of his interest in the land, without



have adopted the lien theory, the assignment of the mortgage, or conveyance of the land by the mortgagee, without reference to the debt, is regarded as a mere nullity.<sup>260</sup>

§ 535. Freedom of transfer from equities.

If the note or other obligation secured by the mortgage is not negotiable, the assignee thereof, like any other assignee of a non-negotiable chose in action, takes it subject to all equities and defenses which existed as between the original parties, such as illegality, failure of consideration, part payment, and the like.<sup>261</sup> In some cases, however, one who makes and delivers a mortgage in favor of another person, which is valid on its face, is estopped, as against an assignee of such mortgage, to assert the invalidity of the mortgage.<sup>262</sup>

the debt, is, even in some of these states, regarded as an absolute nullity. *Devlin v. Collier*, 53 N. J. Law, 422; *Delano v. Bennett*, 90 Ill. 533; *Lunt v. Lunt*, 71 Me. 377; *Ellison v. Daniels*, 11 N. H. 275. But sometimes, apparently, a conveyance by the mortgagee of the land is construed as intended to transfer the mortgage debt also. *Woods v. Woods*, 66 Me. 206; *Connor v. Whitmore*, 52 Me. 186; *Ruggles v. Barton*, 13 Gray (Mass.) 506; *Dearnaley v. Chase*, 136 Mass. 290.

<sup>260</sup> *Jackson v. Bronson*, 19 Johns. (N. Y.) 325, *Kirchwey's Cas.* 629; *Peters v. Jamestown Bridge Co.*, 5 Cal. 334, 63 Am. Dec. 134; *Jordan v. Sayre*, 29 Fla. 100; *Johnson v. Cornett*, 29 Ind. 59; *Merritt v. Bartholick*, 36 N. Y. 44, *Finch's Cas.* 1113; *Swan v. Yaple*, 35 Iowa, 248; *Greve v. Coffin*, 14 Minn. 345 (*Gil.* 263), 100 Am. Dec. 229; *McCammant v. Roberts*, 87 Tex. 241; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72.

<sup>261</sup> *Matthews v. Wallwyn*, 4 Ves. 118, *Kirchwey's Cas.* 643; *Vredenburgh v. Burnet*, 31 N. J. Eq. 229; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Ingraham v. Disborough*, 47 N. Y. 421; *Crane v. Turner*, 67 N. Y. 437; *Moffatt v. Hardin*, 22 S. C. 9; *Olds v. Cummings*, 31 Ill. 188, *Kirchwey's Cas.* 662; *Nichols v. Lee*, 10 Mich. 526, 82 Am. Dec. 57; *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566; *Horstman v. Gerker*, 49 Pa. St. 282, 88 Am. Dec. 501; *Fish v. French*, 15 Gray (Mass.) 520; *Moffett v. Parker*, 71 Minn. 139, 70 Am. St. Rep. 319.

<sup>262</sup> *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642, *Kirchwey's Cas.* 649; *Com. v. City of Pittsburgh*, 34 Pa. St. 496, 520; *Mc-* (1230)



The question whether the assignee of the mortgage takes free from the equities of others than the mortgagor is determined by the general rule prevailing in the particular jurisdiction as to the rights of assignees of choses in action. The more usual rule is that the assignee of any non-negotiable chose in action takes it free from any latent equities in favor of persons other than the obligor, since he has no means of knowing where to inquire as to such equities, and this rule has been applied in favor of the assignee of a mortgage.<sup>263</sup>

In some cases the view is taken that, since the mortgage is merely an incident to the debt, if the note secured is negotiable, the benefit of the rule applicable to negotiable instruments will extend to the mortgage, and render it enforceable for the full amount, without reference to equities existing between the original parties;<sup>264</sup> but in others it is held that the negotiability of the note secured is immaterial, and that the assignee of the mortgage, whether by mere transfer of

*Masters v. Wilhelm*, 85 Pa. St. 218; *First Nat. Bank v. Stiles*, 22 Hun (N. Y.) 339; *State Bank v. Flathers*, 45 La. Ann. 75. And see *Bickerton v. Walker*, 31 Ch. Div. 151. But see, to the contrary, *Davis v. Bechstein*, 69 N. Y. 440, *Kirchwey's Cas.* 691; *Hill v. Hoole*, 116 N. Y. 299.

<sup>263</sup> *Goldthwaite v. First Nat. Bank of Montgomery*, 67 Ala. 549; *Silverman v. Bullock*, 98 Ill. 11; *Vredenburg v. Burnet*, 31 N. J. Eq. 229; *Moffett v. Parker*, 71 Minn. 139, 70 Am. St. Rep. 319; *Losey v. Simpson*, 11 N. J. Eq. 246; *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566. The New York rule is that the assignee takes subject to such equities. *Bush v. Lathrop*, 22 N. Y. 535; *Trustees of Union College v. Wheeler*, 61 N. Y. 88, *Kirchwey's Cas.* 681.

<sup>264</sup> *Carpenter v. Longan*, 16 Wall. (U. S.) 271, *Kirchwey's Cas.* 675; *Paige v. Chapman*, 58 N. H. 333, *Kirchwey's Cas.* 679; *Burhans v. Hutcheson*, 25 Kan. 625, 37 Am. Rep. 274; *Duncan v. City of Louisville*, 13 Bush (Ky.) 378, 26 Am. Rep. 201; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638; *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697; *Taylor v. Page*, 6 Allen (Mass.) 86; *Keyes v. Wood*, 21 Vt. 331; *Pierce v. Faunce*, 47 Me. 507; *Barnum v. Phenix*, 60 Mich. 388; *Thompson v. Maddux*, 117 Ala. 468. Compare *Blumenthal v. Jassoy*, 29 Minn. 177. See 1 *Daniel, Neg. Inst.* (4th Ed.) §§ 834-834b.

the note or otherwise, takes subject to all existing equities, in favor of the mortgagor at least.<sup>265</sup>

### § 536. Record and notice.

Assignments of mortgages are usually regarded as being within the operation of the recording acts, this being sometimes expressly provided by the statute.<sup>266</sup> The requirement that the assignment shall be recorded does not, however, render an unrecorded assignment invalid, but merely prevents the assignee in such an assignment from asserting any rights as against persons who acted on the assumption that the mortgage still belonged to the mortgagee.<sup>267</sup> An ordi-

<sup>265</sup> *Baily v. Smith*, 14 Ohio St. 396, 84 Am. Dec. 385, *Kirchwey's Cas.* 667; *Tabor v. Foy*, 56 Iowa, 539; *Kleeman v. Frisbie*, 63 Ill. 482; *Johnson v. Carpenter*, 7 Minn. 176 (Gil. 120).

<sup>266</sup> *Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655; *Merrill v. Luce*, 6 S. D. 354, 55 Am. St. Rep. 844; *Robbins v. Larson*, 69 Minn. 436, 65 Am. St. Rep. 572; *Bacon v. Van Schoonhoven*, 87 N. Y. 446; *Bank of Indiana v. Anderson*, 14 Iowa, 544, 83 Am. Dec. 390; *Pepper's Appeal*, 77 Pa. St. 373; *Henderson v. Pilgrim*, 22 Tex. 464. But see *Reeves v. Hayes*, 95 Ind. 521; *Watson v. Dundee Mortgage & Trust Inv. Co.*, 12 Or. 474.

The word "conveyance" in a recording act has been held to include an assignment of mortgage. *Decker v. Boice*, 83 N. Y. 220; *Merrill v. Luce*, 6 S. D. 354, 55 Am. St. Rep. 844; *Burns v. Berry*, 42 Mich. 176. *Contra*, *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566; *Watson v. Dundee Mortgage & Trust Inv. Co.*, 12 Or. 474.

<sup>267</sup> *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532; *Greene v. Warnick*, 64 N. Y. 220; *Bridges v. Bidwell*, 20 Neb. 185; *Sprague v. Rockwell*, 51 Vt. 401.

If the mortgagee purchases the land after assigning the mortgage, a subsequent purchaser from him cannot claim that the mortgage was, as against him, extinguished by merger, on the ground that, because the assignment was not recorded, he had reason to believe that the mortgage belonged to the mortgagee at the time when the latter owned the land. *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532; *Oregon & Washington Trust Inv. Co. v. Shaw*, 5 Sawy. 336, Fed. Cas. No. 10,556; 1 *Jones, Mortgages*, § 482. *Contra*, *Bowling v. Cook*, 39 Iowa, 200. Compare *International Bank of Chicago v. Wilshire*, 108 Ill. 143.

nary instance of the failure to record the assignment thus resulting in misleading third persons occurs in the case of a purchase of the land by one in the belief that a satisfaction by the mortgagee was valid, when in fact the mortgagee had no right to give a satisfaction, having assigned the mortgage, and in such case the assignee, having failed to record his assignment, can assert no claim as against such innocent purchaser.<sup>268</sup> The same principle applies in favor of any person who in good faith deals with the mortgagee on the assumption that he still owns the mortgage.<sup>269</sup>

The record of the assignment is not constructive notice to the mortgagor, since the latter's interest antedates the assignment, and consequently the mortgagor may make payments on the mortgage to the mortgagee, so long as he is without actual notice of the assignment.<sup>270</sup>

As the failure to record an assignment may, in certain cases, postpone the assignee, so the recording of the assignment will enable him to fully assert his rights under the mortgage. Accordingly, a purchaser of the premises or of an interest therein, after the recording of the assignment, is charged with notice thereof, and is not justified in paying the mortgage debt to the assignor.<sup>271</sup>

<sup>268</sup> *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 859; *Ladd v. Campbell*, 56 Vt. 529; *Fisher v. Cowles*, 41 Kan. 418; *Swartz's Ex'rs v. Leist*, 13 Ohio St. 419; *Henderson v. Pilgrim*, 22 Tex. 464; *Vann v. Marbury*, 100 Ala. 438, 46 Am. St. Rep. 70.

<sup>269</sup> *Parmenter v. Oakley*, 69 Iowa, 388. So the assignee, not having recorded the assignment, cannot assert his rights as against one who, without notice of the assignment, redeemed from a sale under a foreclosure proceeding instituted by the mortgagee after making the assignment. *Merrill v. Luce*, 6 S. D. 354, 55 Am. St. Rep. 844.

<sup>270</sup> *Foster v. Carson*, 159 Pa. St. 477, 39 Am. St. Rep. 696; *Van Keuren v. Corkins*, 66 N. Y. 77; *Olson v. Northwestern Guaranty Loan Co.*, 65 Minn. 475; *Rodgers v. Peckham*, 120 Cal. 238. So, by statute, in a number of states. 1 *Stimson's Am. St. Law*, § 1870.

<sup>271</sup> *Brewster v. Carner*, 103 N. Y. 556; *Viele v. Judson*, 82 N. Y. 32.

An assignee of a mortgage is not only usually required by the recording acts to record his assignment, but he is also entitled to the protection of such acts, and consequently his rights are superior to the rights of persons claiming under prior unrecorded conveyances, including assignments of the same mortgage,<sup>272</sup> though he takes subject to rights existing under instruments which have been duly recorded.<sup>273</sup>

When the mortgagee makes successive assignments of the mortgage, the assignee later in time is usually charged with notice of the prior assignment by the fact that the mortgagee has delivered the notes or other evidence of the debt to the prior assignee, and consequently the failure to record the prior assignment is usually immaterial.<sup>274</sup> But when this circumstance does not control, the assignee who first records his assignment has precedence.<sup>275</sup>

#### V. PAYMENT, REDEMPTION, AND DISCHARGE.

Payment or tender of the sum or obligation secured, if made before default, will usually revert the title in the mortgagor or his transferee, free from any claim by the mortgagee, unless the mortgage expressly requires a retransfer of the legal title. A payment or tender after default will also have that effect, except in some of the states in which the legal title is in the mortgagee.

<sup>272</sup> *Burns v. Berry*, 42 Mich. 176; *Pepper's Appeal*, 77 Pa. St. 373; *Decker v. Boice*, 83 N. Y. 215; *Jackson v. Reid*, 30 Kan. 10; *Blunt v. Norris*, 123 Mass. 55, 25 Am. Rep. 14. But when the statute gives one priority, as against an earlier unrecorded conveyance, only if his own conveyance is first recorded, an assignee of a mortgage must first record his assignment in order to claim priority. *Westbrook v. Gleason*, 79 N. Y. 23.

<sup>273</sup> *Robbins v. Larson*, 69 Minn. 436, 65 Am. St. Rep. 572; *Brower v. Witmeyer*, 121 Ind. 83.

<sup>274</sup> *Kellogg v. Smith*, 26 N. Y. 18; *Porter v. King*, 1 Fed. 755; 1 *Jones, Mortgages*, § 483. And see *Byles v. Tome*, 39 Md. 461.

<sup>275</sup> *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532; *Wiley v. Williamson*, 68 Ala. 71; *Potter v. Stransky*, 48 Wis. 235.



Any person having an estate in or lien on the land which is subsequent to the mortgage lien may redeem from the mortgage by paying the amount of the obligation secured thereby. A person so redeeming, if not himself primarily liable for the whole obligation, may compel those primarily liable, or jointly liable with him, to exonerate him, or to contribute their proper share, and, for the purpose of enforcing this right, he is entitled to be subrogated to the rights of the mortgagee as against the land.

When the mortgage and the mortgaged land become the property of one person, the mortgage is merged or extinguished, unless a contrary intention appears, or can be presumed.

#### § 537. Payment or tender before default.

Even at common law, the payment of the sum named in the mortgage, or other compliance with the terms of the condition therein, if made at or before the time named therein,<sup>276</sup> operated to terminate the estate of the mortgagee, and the absolute title became revested in the mortgagor, upon entry by him, without any reconveyance or other act on the part of the mortgagee.<sup>277</sup>

<sup>276</sup> The mortgagor or other owner of the land cannot insist on paying off the debt secured before the time at which it is due by the terms of the contract, except by consent of the creditor. *Brown v. Cole*, 14 Sim. 427, 9 Jur. 290, *Kirchwey's Cas.* 698; *Weldon v. Tollman*, 67 Fed. 986; *Bowen v. Julius*, 141 Ind. 310; *Moore v. Kime*, 43 Neb. 517. In case of such payment by consent, the effect on the mortgage lien is the same as in the case of payment at maturity. *Burgaine v. Spurling*, Cro. Car. 283, *Kirchwey's Cas.* 697; *Holman v. Bailey*, 3 Metc. (Mass.) 55, and authorities cited.

<sup>277</sup> Litt. § 334; *Coote, Mortgages*, 4; 4 *Kent's Comm.* 193; *Merrill v. Chase*, 3 Allen (Mass.) 339; *Grover v. Flye*, 5 Allen (Mass.) 543, *Kirchwey's Cas.* 702; *Perkins' Lessee v. Dibble*, 10 Ohio, 433; *Stewart v. Crosby*, 50 Me. 130, *Kirchwey's Cas.* 709; *McNair v. Picotte*, 33 Mo. 57.

In England, however, at the present day, the mortgage usually provides, not that it shall be void upon compliance with the condition, but that the mortgagee shall make a reconveyance, and



In equity, and in those states in which the equitable theory of mortgages has been adopted, the payment of the mortgage debt at maturity, by the person whose duty it is to pay it, will extinguish the lien.<sup>278</sup>

In order to terminate the interest of the mortgagee, a legal and sufficient tender of payment before default is equivalent to payment, and thereafter, though the mortgagee may have a right to enforce a personal liability for the debt, he cannot enforce any liability on the part of the land.<sup>279</sup>

**§ 538. Payment or tender after default.**

At common law, since, by the breach of condition, an absolute estate became vested in the mortgagee, a payment after default, although accepted by the mortgagee, could not revest the legal title in the mortgagor, and a reconveyance or release was necessary for this purpose.<sup>280</sup> This view has been accepted in some of the states in which the common-law theory of mortgages is adopted,<sup>281</sup> though not in all.<sup>282</sup>

consequently the legal title remains outstanding in the mortgagee until he makes such reconveyance. See Williams, *Real Property* (18th Ed.) 513; *Stewart v. Crosby*, 50 Me. 130, *Kirchwey's Cas.* 709.

<sup>278</sup> See post, § 545.

<sup>279</sup> *Litt.* §§ 335, 338; *Co. Litt.* 209; *Crain v. McGoon*, 86 Ill. 431, 29 *Am. Rep.* 37; *Lynch v. Hancock*, 14 S. C. 66; *Merritt v. Lambert*, 7 *Paige* (N. Y.) 344; *Kortright v. Cady*, 21 N. Y. 343, 78 *Am. Dec.* 145; *Willard v. Harvey*, 5 N. H. 252; *Schearff v. Dodge*, 33 *Ark.* 346.

<sup>280</sup> *Litt.* § 332; 4 *Kent's Comm.* 193. Reading on Mortgages, by Judge Trowbridge, 8 *Mass.* 551, 553, 558.

<sup>281</sup> *Phelps v. Sage*, 2 *Day* (Conn.) 151; *Doton v. Russell*, 17 *Conn.* 146; *Shields v. Lozeau*, 34 N. J. *Law*, 496, 3 *Am. Rep.* 256, *Kirchwey's Cas.* 728; *Stewart v. Crosby*, 50 Me. 130, *Kirchwey's Cas.* 709; *Parsons v. Welles*, 17 *Mass.* 419; *Smith v. Doe*, 26 *Miss.* 291; *Brobst v. Brock*, 10 *Wall.* (U. S.) 519, 536.

<sup>282</sup> *Brown v. Stewart*, 56 *Md.* 430; *Morgan's Lessee v. Davis*, 2 *Har. & McH.* (Md.) 9, 17; *Maxwell v. Moore*, 95 *Ala.* 166, 36 *Am. St. Rep.* 190; *Perkins' Lessee v. Dibble*, 10 *Ohio*, 433. See 4 *Kent's Comm.* 194, note. In some states, payment has, by statute, the effect of revesting title in the mortgagee. See *Griffin v. Lovell*, 42 *Miss.* 402; *Swett v. Horn*, 1 N. H. 332; *Hussey v. Fisher*, 94 *Me.* 301.

In jurisdictions where payment after default is thus insufficient to divest the mortgagee's legal title, a mere tender of payment after default can have no greater effect;<sup>283</sup> but even in those jurisdictions the legal title cannot, after such payment or tender, be utilized for the purpose of foreclosing the mortgage or depriving the mortgagor of possession of the land.<sup>284</sup>

In those states which have adopted the equitable or lien theory of mortgages, since the payment of the debt after default completely extinguishes the lien, and there is no title or estate in the mortgagee, no act on his part is necessary to free the land from all claim by him.<sup>285</sup> A tender of payment after default is, in a few of these states, regarded as sufficient to divest the lien of the mortgage, even though not kept good, and, after a refusal of a tender once made, the mortgagee, though he may enforce the personal liability of the mortgagor, cannot enforce the mortgage lien.<sup>286</sup> In

<sup>283</sup> *Phelps v. Sage*, 2 Day (Conn.) 151; *Shields v. Lozear*, 34 N. J. Law, 496, 3 Am. Rep. 256, *Kirchwey's Cas.* 728; *Rowell v. Mitchell*, 68 Me. 21; *Maynard v. Hunt*, 5 Pick. (Mass.) 240, *Kirchwey's Cas.* 706; *Currier v. Gale*, 9 Allen (Mass.) 522; *Parker v. Beasley*, 116 N. C. 1.

<sup>284</sup> *Stewart v. Crosby*, 50 Me. 130, *Kirchwey's Cas.* 709; *Robinson v. Cross*, 22 Conn. 171; *Wade v. Howard*, 11 Pick. (Mass.) 289; *Baker v. Gavitt*, 128 Mass. 93; *Harrison v. Eldridge*, 7 N. J. Law, 392, 407; *Shields v. Lozear*, 34 N. J. Law, 496, 3 Am. Rep. 256, *Kirchwey's Cas.* 728.

<sup>285</sup> *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145, *Kirchwey's Cas.* 713; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Potts v. Plaisted*, 30 Mich. 149.

But in some cases the mortgage may be kept alive in favor of the person making the payment, he being "subrogated" to the rights of the mortgagee in order that he may enforce "contribution" or "exoneration." See post, §§ 544, 545.

<sup>286</sup> *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145, *Kirchwey's Cas.* 713; *McClung v. Missouri Trust Co.*, 137 Mo. 106; *Caruthers v. Humphrey*, 12 Mich. 270; *McClellan v. Coffin*, 93 Ind. 456; *Sager v. Tupper*, 35 Mich. 134; *Eslow v. Mitchell*, 26 Mich. 500; *Salinas*

others of such states it is necessary that the tender be kept good by the mortgagor;<sup>287</sup> and this view—that the tender must be kept good in order to affect the mortgage security—has been adopted in states where the common-law theory of mortgages controls.<sup>288</sup>

The right to pay the debt after default, and to thereby extinguish the claim of the mortgagee against the land, is what we have before referred to as the right of redemption,<sup>289</sup> it being, in the English court of chancery, regarded as a right to regain what has been forfeited and lost. In this country the same term is applied in states where the equitable or lien theory of mortgages is accepted, as well as in those adopting the English theory; but it is plainly a misnomer in the former class of states, since the failure to pay at maturity does not in any sense cause a forfeiture of the mortgagor's rights, it merely giving the mortgagee a right to foreclose or to recover on the mortgagor's personal obligation.

### § 539. Formal discharge or satisfaction.

Though it is unnecessary, in order to divest the lien of the mortgage, that payment be followed by a formal discharge, the mortgagor or other owner of the property almost invariably requires such a discharge, in order that the mort-

v. Ellis, 26 S. C. 337. See *Moore v. Norman*, 43 Minn. 428, 19 Am. St. Rep. 247. But in some of these states it is held that, if the mortgagor seeks affirmative relief in equity, he must keep his tender good. *Tuthill v. Morris*, 81 N. Y. 94, *Kirchwey's Cas.* 736; *Cowles v. Marble*, 37 Mich. 158.

<sup>287</sup> *Perre v. Castro*, 14 Cal. 519, 76 Am. Dec. 444; *Himmelman v. Fitzpatrick*, 50 Cal. 650; *Matthews v. Lindsay*, 20 Fla. 973.

<sup>288</sup> *Shields v. Lozear*, 34 N. J. Law, 496, 3 Am. Rep. 256, *Kirchwey's Cas.* 728; *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37; *Parker v. Beasley*, 116 N. C. 1; *Maxwell v. Moore*, 95 Ala. 166, 36 Am. St. Rep. 190; *Bailey v. Metcalf*, 6 N. H. 156.

<sup>289</sup> See ante, § 508.

gage may not constitute a cloud on his title, and he may usually compel it to be given by bill in equity or equivalent statutory proceeding.<sup>290</sup> The discharge may be by a formal deed of release or reconveyance;<sup>291</sup> but the statute usually provides for an entry of satisfaction on the margin of the official record in which the mortgage has been enrolled.<sup>292</sup> A penalty is frequently imposed by statute in case the mortgagee, or the person who has succeeded to his interest, refuses to make such entry.<sup>293</sup>

### § 540. Enforcement of right of redemption.

The mortgagee occasionally refuses to allow the mortgagor, or other person entitled to redeem, to exercise such right, thereby subjecting the land to a continuance of the mortgage lien, and perhaps impairing the validity or vendibility of the title. In such a case, and likewise when the mortgagee claims that the conveyance to him was absolute, and not by way of mortgage, or when there is a dispute as to the amount due, the mortgagor or other person entitled to redeem may proceed in equity to enforce the right of redemption, and may obtain a decree compelling the mortgagee, upon payment of the debt, to release or discharge the

<sup>290</sup> *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Kingman v. Sinclair*, 80 Mich. 427; *Booth v. Hoskins*, 75 Cal. 271.

<sup>291</sup> *Allen v. Leominster Sav. Bank*, 134 Mass. 580; *Mutual Building & Loan Ass'n v. Wyeth*, 105 Ala. 639; *Hoyt v. Swift*, 13 Vt. 129, 37 Am. Dec. 586.

<sup>292</sup> See *Beal v. Stevens*, 72 Cal. 451; *Allen v. Leominster Sav. Bank*, 134 Mass. 580; *Shields v. Lozear*, 34 N. J. Law, 496, 3 Am. Rep. 256; *Hoyt v. Swift*, 13 Vt. 129, 37 Am. Dec. 586; 1 Jones, *Mortgages*, §§ 989-1037.

<sup>293</sup> See *Jarratt v. McCabe*, 75 Ala. 325; *Judy v. Thompson*, 156 Ind. 533; *Kennedy v. Moore*, 91 Iowa, 39; *Malarkey v. O'Leary*, 34 Or. 493; *Crawford v. Simon*, 159 Pa. St. 585.

mortgage.<sup>294</sup> The mortgagor must, in his bill, offer to pay the amount due, including interest.<sup>295</sup>

The decree, if in favor of the plaintiff, provides that the mortgagee shall satisfy or release the mortgage and deliver up the instrument of indebtedness upon the payment by the mortgagor of the amount due within a time named.<sup>296</sup> A dismissal of the bill cuts off any right of redemption, and is thus equivalent to a decree of foreclosure.<sup>297</sup>

— Bar by lapse of time.

A mortgagor may be barred of his right to redeem by the lapse of time; equity usually adopting for this purpose the period of limitation applicable to suits for the recovery of land, after which time the equity of redemption is presumed to be extinguished.<sup>298</sup> But in order that the mortgagor's rights may be thus extinguished by lapse of time, it is necessary that the mortgagee be in possession, and that this possession be adverse to the mortgagor.<sup>299</sup>

<sup>294</sup> 3 Pomeroy, Eq. Jur. § 1219; 2 Jones, Mortgages, § 1093.

<sup>295</sup> Adams v. Sayre, 70 Ala. 318; Way v. Mullett, 143 Mass. 49; Eastman v. Thayer, 60 N. H. 408; Berkman v. Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246.

<sup>296</sup> See 2 Jones, Mortgages, § 1106; Bremer v. Calumet & Chicago Canal & Dock Co., 127 Ill. 464; Dennett v. Codman, 158 Mass. 371; McKenna v. Kirkwood, 50 Mich. 544; Perine v. Dunn, 4 Johns. Ch. (N. Y.) 140; Martin v. Ratcliff, 101 Mo. 254.

<sup>297</sup> Winchester v. Paine, 11 Ves. 194, 199; Casserly v. Witherbee, 119 N. Y. 522; Flanders v. Hall, 159 Mass. 95.

<sup>298</sup> Hughes v. Edwards, 9 Wheat. (U. S.) 489; Slicer v. Pittsburg Bank, 16 How. (U. S.) 571; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 135, 8 Am. Dec. 467; Finch's Cas. 1047; Jarvis v. Woodruff, 22 Conn. 548; Morgan v. Morgan, 10 Ga. 297; Dexter v. Arnold, 1 Sumn. 109, Fed. Cas. No. 3,857; Roberts v. Littlefield, 48 Me. 61; McNair v. Lot, 34 Mo. 285, 84 Am. Dec. 78; Robinson v. Fife, 3 Ohio St. 551.

<sup>299</sup> Green v. Turner, 38 Iowa, 112; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613; Bird v. Keller, 77 Me. 270; Anding v. Davis, 38 Miss. 574, 77 Am. Dec. 658; Hubbell v. Sibley, 50 N. Y. 468; Simmons v. Ballard, 102 N. C. 105; Knowlton v. Walker, 13 Wis. 264; Frink v. Le Roy, 49 Cal. 314.



**§ 541. Persons entitled to redeem.**

Any persons who are interested in the mortgaged land, or have a legal or equitable lien thereon, and are in privity with and claim under the mortgagor, may redeem from the mortgage.<sup>300</sup> Accordingly, the right may be exercised by a purchaser of the whole or a part of the mortgaged premises from the mortgagor, or from one claiming under the mortgagor,<sup>301</sup> by a subsequent mortgagee or holder of a judgment lien,<sup>302</sup> an heir or devisee of the owner of the land,<sup>303</sup> or by one entitled to dower or curtesy therein.<sup>304</sup> A person, however, who is not affected by the mortgage, and whose rights are prior thereto, or who has no interest whatever in the land, cannot redeem.<sup>305</sup>

<sup>300</sup> 4 Kent's Comm. 162; *Sellwood v. Gray*, 11 Or. 534; *Platt v. Squire*, 12 Metc. (Mass.) 494; *Grant v. Duane*, 9 Johns. (N. Y.) 611; *Powers v. Golden Lumber Co.*, 43 Mich. 468; *Rapier v. Gulf City Paper Co.*, 64 Ala. 330; *Smith v. Austin*, 9 Mich. 475.

<sup>301</sup> *Scott v. Henry*, 13 Ark. 112; *Dunlap v. Wilson*, 32 Ill. 517; *Wood v. Goodwin*, 49 Me. 260, 77 Am. Dec. 259; *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762.

<sup>302</sup> *Stonehewer v. Thompson*, 2 Atk. 440; *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149; *Sager v. Tupper*, 35 Mich. 134; *Rogers v. Heron*, 92 Ill. 583; *Knowles v. Rablin*, 20 Iowa, 101; *McIntier v. Shaw*, 6 Allen (Mass.) 83; *Loomis v. Knox*, 60 Conn. 343; *Todd v. Johnson*, 56 Minn. 60.

<sup>303</sup> *Chew v. Hyman*, 10 Biss. 240, 7 Fed. 7; *Zægel v. Kuster*, 51 Wis. 31; *Hunter v. Dennis*, 112 Ill. 568; *Lewis v. Nangle*, 2 Ves. Sr. 431.

<sup>304</sup> *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Kirchwey's Cas.* 698; *Davis v. Wetherell*, 13 Allen (Mass.) 60, 90 Am. Dec. 177; *Mills v. Van Voorhies*, 20 N. Y. 412; *Gatewood v. Gatewood*, 75 Va. 407; *Vaughan v. Dowden*, 126 Ind. 406; *McArthur v. Franklin*, 16 Ohio St. 193; *Rossiter v. Cossit*, 15 N. H. 38.

<sup>305</sup> *Lomax v. Bird*, 1 Vern. 182; *Rapier v. Gulf City Paper Co.*, 64 Ala. 332; *Byington v. Buckwalter*, 7 Iowa, 512, 74 Am. Dec. 279; *Grant v. Duane*, 9 Johns. (N. Y.) 591; *Sinclair v. Learned*, 51 Mich. 335; 2 Jones, Mortgages, § 1055.

**§ 542. Amount necessary for redemption.**

In order to redeem from a mortgage, it is necessary to pay the entire mortgage debt, if due, or so much thereof as may be due, together with interest to the time of redemption.<sup>306</sup> Though a person has an undivided interest only in the mortgaged premises, or owns a part only in severalty, he must, as a general rule, offer to pay the entire mortgage debt, since the mortgagee is entitled to retain his lien on every part of the land until his debt is entirely paid.<sup>307</sup> And, accordingly, a widow, entitled to dower, who desires to redeem, must pay the whole amount of the debt, and not merely one-third thereof.<sup>308</sup>

**§ 543. Tacking and consolidation.**

By the doctrine of "tacking," which has long prevailed in England, a mortgagee, having the legal estate, may, upon

<sup>306</sup> 4 Kent's Comm. 163; *Cowles v. Marble*, 37 Mich. 158; *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Meacham v. Steele*, 93 Ill. 135; *Merritt v. Hosmer*, 11 Gray (Mass.) 276, 71 Am. Dec. 713.

This is so even when a sale under the mortgage has taken place, and the property was sold for less than the amount of the mortgage. *Collins v. Riggs*, 14 Wall. (U. S.) 491; *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Martin v. Fridley*, 23 Minn. 13.

<sup>307</sup> *Titley v. Davis*, 2 Eq. Cas. Abr. 604, *Kirchwey's Cas.* 697; *Palk v. Clinton*, 12 Ves. 59; *Gibson v. Crehore*, 5 Pick. (Mass.) 146, *Kirchwey's Cas.* 698; *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *Meacham v. Steele*, 93 Ill. 135; *Merritt v. Hosmer*, 11 Gray (Mass.) 276, 71 Am. Dec. 713; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Bell v. City of New York*, 10 Paige (N. Y.) 49; *Coffin v. Parker*, 127 N. Y. 117; *Andreas v. Hubbard*, 50 Conn. 351; *Franklin v. Gorham*, 2 Day (Conn.) 1421, 2 Am. Dec. 86.

One may, however, redeem part of the land by payment of part of the debt if the holder of the mortgage assents thereto. *Union Mut. Life Ins. Co. v. Kirchoff*, 133 Ill. 368; *Kerse v. Miller*, 169 Mass. 44.

<sup>308</sup> *McCabe v. Bellows*, 7 Gray (Mass.) 148, 66 Am. Dec. 467; *Merselis v. Van Riper*, 55 N. J. Eq. 618.

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making a further advance or acquiring a further charge on the same land, tack or add the further charge to his original debt, and hold the legal estate as against intermediate incumbrancers until he is satisfied in full; and, by an extension of the same doctrine, a third mortgagee, who has advanced his money without notice of a second mortgage or charge, may, on taking an assignment of the first mortgage, and thus acquiring the legal title, "tack" it to the third mortgage, and "squeeze out" the intervening mortgage or charge. The doctrine is based on the theory that the equities of the second and third incumbrancers are equal, and that therefore the legal title will prevail.<sup>309</sup> The third mortgagee must, however, be without notice of the second mortgage or incumbrance at the time of making the advance, and it results from this requirement that in the United States, where constructive knowledge of the second incumbrance is given to the third incumbrancer by the record, there is no room for the application of the principle;<sup>310</sup> and even apart from the question of notice, it could have no application in states in which a mortgage does not convey a legal title.

The doctrine of "consolidation," as applied to mortgages in England, consists in the right of the holder of two mortgages on different pieces of land, which belong to the same person, to retain each mortgage as a subsisting lien on the land until the debts secured by both the mortgages are paid.<sup>311</sup> The equity of the doctrine, especially against in-

<sup>309</sup> *Marsh v. Lee*, 2 Vent. 337, 1 White & T. Lead. Cas. Eq. 837, notes; *Brace v. Marlborough*, 2 P. Wms. 491; 1 Leake, 507, 509; 2 Robbins, Mortgages, 1219.

<sup>310</sup> *Grant v. Bissett*, 1 Caines Cas. (N. Y.) 112; *Osborn v. Carr*, 12 Conn. 208; *Averill v. Guthrie*, 8 Dana (Ky.) 84; *Loring v. Cooke*, 3 Pick. (Mass.) 48; *Brazee v. Lancaster Bank*, 14 Ohio, 321; *Anderson v. Neff*, 11 Serg. & R. (Pa.) 223; *Siter v. McClanachan*, 2 Grat. (Va.) 280; 4 Kent's Comm. 178; *Marsh v. Lee*, 1 White & T. Lead. Cas. Eq. 853.

<sup>311</sup> 2 Robbins, Mortgages, 855; *Williams, Real Prop.* 441; 1 Leake, 513; 4 Kent's Comm. 179, note 1(d) B.

nocent purchasers, has been frequently questioned, and by a modern enactment it applies to mortgages only when an intention that it shall apply is apparent.<sup>312</sup> It has never been adopted in this country.<sup>313</sup>

— Tacking unsecured claims.

Applying the maxim that he who seeks equity must do equity, it has been held in some states that the mortgagor cannot obtain a decree for redemption unless he pays not only the mortgage debt and interest, but also all other debts due by him to the mortgagee.<sup>314</sup> In other states, however, as in England, it is held that the mortgagee cannot thus charge collateral debts against the mortgaged property.<sup>315</sup>

<sup>312</sup> Conveyancing and Law of Property Act 1881, § 17.

<sup>313</sup> See 2 Jones, Mortgages, § 1083.

<sup>314</sup> *Scripture v. Johnson*, 3 Comm. 211; *Lee v. Stone*, 5 Gill & J. (Md.) 1; *Lake v. Shumate*, 20 S. C. 23; *Anthony v. Anthony*, 23 Ark. 479 (but see *Cohn v. Hoffman*, 56 Ark. 119); *Brown v. Gaffney*, 32 Ill. 251; *Chase v. McDonald*, 7 Har. & J. (Md.) 161, 196; *Lee v. Stone*, 5 Gill & J. (Md.) 1; *Downing v. Palmateer*, 1 T. B. Mon. (Ky.) 64, 70; *Siter v. McClanachan*, 2 Grat. (Va.) 280, 299; *Walling v. Aiken*, 1 McMul. Eq. (S. C.) 2, 10; *Leeds v. Gifford*, 41 N. J. Eq. 464.

<sup>315</sup> *Challis v. Casborn*, Finch, Prec. Ch. 407, *Kirchwey's Cas.* 500; *Coleman v. Winch*, 1 P. Wms. 775, *Kirchwey's Cas.* 501; *Jones v. Smith*, 2 Ves. Jr. 372, 376; *Mahoney v. Bostwick*, 96 Cal. 53; *Brooks v. Brooks*, 169 Mass. 38; *Corporation for Relief of Poor Distressed Presbyterian Ministers v. Wallace*, 3 Rawle (Pa.) 109, 155.

In Massachusetts, however, the mortgagee has this right if there was an oral agreement that the mortgage should be security for such debts. *Joslyn v. Wyman*, 5 Allen (Mass.) 62; *Taft v. Stoddard*, 142 Mass. 545.

Even in England it is held that an heir or devisee seeking to redeem must pay, in addition to the mortgage debt, a debt of the deceased which is payable out of the land as being assets in the hands of such heir or devisee, this being stated to be for the purpose of avoiding circuitry of action. *Coleman v. Winch*, 1 P. Wms. 777, *Kirchwey's Cas.* 501; *Rolfe v. Chester*, 20 Beav. 610; *Elvy v. Norwood*, 21 Law J. Ch. 716. But this rule is not there applied to the detriment of other creditors of equal degree, or incumbrancers (1244)

The right to thus tack collateral debts for the purpose of foreclosure, as distinct from redemption, has never been recognized.<sup>316</sup>

§ 544. Exoneration and contribution.

In the absence of a statutory provision to the contrary, or a different intention apparent from the will, the heir or devisee may require the executor or administrator to pay off a mortgage on the land securing a debt for which the deceased was personally liable, the theory being that it was the personal estate which received the benefit from the creation of the debt, and that it therefore should pay it.<sup>317</sup> This rule is now changed in England by statute.<sup>318</sup> In a number of states in this country, likewise, the matter is covered by statutory provisions of varying character, prescribing the order of payment of a decedent's debts, and determining the order of liability of the different classes of property and rights of contribution between them.<sup>319</sup>

The common-law rule never applied to cases in which the mortgage debt was neither created by the deceased nor in some way made by him his own debt,<sup>320</sup> and the right does

whose rights have accrued between the time of the mortgage and the creation of the debt. *Powis v. Corbet*, 3 Atk. 556, *Kirchwey's Cas.* 502; 1 Story, Eq. Jur. §§ 418, 419; *Hamerton v. Rogers*, 1 Ves. Jr. 513, and Sumner's note.

<sup>316</sup> *Lee v. Stone*, 5 Gill & J. (Md.) 1, *Kirchwey's Cas.* 504; *Anthony v. Anthony*, 23 Ark. 479; *Tunno v. Robert*, 16 Fla. 738.

<sup>317</sup> *Lutkins v. Leigh*, Cas. t. Talb. 54; *Ancaster v. Mayer*, 1 Brown Ch. 454, 1 White & T. Lead. Cas. Eq. 881, notes; *Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; *Sutherland v. Harrison*, 86 Ill. 363; *Brown v. Baron*, 162 Mass. 56, 44 Am. St. Rep. 331; *Hoff's Appeal*, 24 Pa. St. 200, 4 Gray's Cas. 832; *Gould v. Winthrop*, 5 R. I. 319; 2 Woerner, Administration, § 494; 9 Am. & Eng. Enc. Law (2d Ed.) 1317 et seq.

<sup>318</sup> 17 & 18 Vict. c. 113 (Locke King's Act, A. D. 1854).

<sup>319</sup> See 11 Am. & Eng. Enc. Law (2d Ed.) 1063; 19 Am. & Eng. Enc. Law (2d Ed.) 1333; 2 Woerner, Administration, § 497.

<sup>320</sup> 2 Williams, Executors (9th Ed.) 1565 et seq.; *Evelyn v. Evelyn*, (1245)



not exist in favor of the heir or devisee as against a legatee, other than the residuary legatee.<sup>321</sup>

The equitable doctrine of contribution is applied, as before indicated, in favor of a person interested in the land who pays the whole mortgage debt, when he should properly, as against others interested in the land, pay a part only; and in case he pays off a debt which should be entirely satisfied by another person interested in the land, he is entitled to complete "exoneration,"—that is, to recover the whole amount paid from the person primarily liable. This right to contribution or exoneration is usually enforced by means of the doctrine of subrogation, discussed in the next section.

#### § 545. Subrogation of person redeeming.

In the law of mortgages there is frequent occasion for the application of the equitable doctrine of subrogation, by which one who, in order to protect his interests, is compelled to pay a debt for which he is not primarily liable, is entitled to stand in the place of the original creditor, with all the rights belonging to the latter, including particularly the right to enforce any securities which the latter may have held for the payment of the debt. This right is sometimes given the name of "equitable assignment," as being in effect an assignment, implied by equity, to the person making the payment, and, since an assignment is thus implied, it is usually imma-

2 P. Wms. 659; *Scott v. Beecher*, 5 Madd. 96; *Hoff's Appeal*, 24 Pa. St. 200; *Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; *Creesy v. Willis*, 159 Mass. 249; *Minter v. Burnett*, 90 Tex. 245.

<sup>321</sup> 2 Williams, Executors, 1564; *Hamilton v. Worley*, 2 Ves. Jr. 65; *Hoff's Appeal*, 24 Pa. St. 206; *Thomas v. Thomas*, 17 N. J. Eq. 356; *Mollan v. Griffith*, 3 Paige (N. Y.) 402. In Massachusetts the devisee or heir is exonerated as against a general legatee. *Hewes v. Dehon*, 3 Gray (Mass.) 205; *Plimpton v. Fuller*, 11 Allen (Mass.) 139; *Brown v. Baron*, 162 Mass. 56.

terial whether he takes an actual assignment of the rights and securities of the original creditor.

The doctrine is applied for the benefit of a surety, who, upon paying his principal's debt, thereby becomes entitled to stand in the place of the creditor, in order to obtain indemnity; and, accordingly, when the debt is secured by mortgage, the surety is, on paying it, entitled to the benefit of such mortgage, being in equity regarded as the assignee thereof.<sup>322</sup> Likewise, a person who, as having an interest in the property subsequent to the mortgage, is obliged to redeem from the mortgage in order to protect his interest, may be subrogated to the right of the mortgagee to enforce the mortgage, in order to compel contribution by the other persons interested in the property.<sup>323</sup>

As a general rule, any person who is entitled to redeem, as having an interest in the land, is entitled to be subrogated on making such redemption, provided he be not primarily and solely liable for the mortgage debt. The right exists in favor of the mortgagor if, by reason of his grantee's assumption of the mortgage debt, he has himself ceased to be primarily liable therefor;<sup>324</sup> and this is so even when the gran-

<sup>322</sup> *Taylor v. Tarr*, 84 Mo. 420; *Matthews v. Fidelity Title & Trust Co. (C. C.)* 52 Fed. 687; *Conner v. Howe*, 35 Minn. 518; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Telford v. Garrels*, 132 Ill. 550; *Jones v. Tincer*, 15 Ind. 308, 77 Am. Dec. 92.

<sup>323</sup> *Muir v. Berkshire*, 52 Ind. 149; *Mosier's Appeal*, 56 Pa. St. 76, 93 Am. Dec. 783; *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394; *Arnold v. Green*, 116 N. Y. 566, *Finch's Cas.* 1115; *Gatewood v. Gatewood*, 75 Va. 407; *Champlin v. Williams*, 9 Pa. St. 341; *Young v. Morgan*, 89 Ill. 199; *Swain v. Stockton Sav. & Loan Soc.*, 78 Cal. 600, 12 Am. St. Rep. 118.

The right to subrogation exists even though the mortgage is discharged upon the record. *Arnold v. Green*, 116 N. Y. 566; *Cobb v. Dyer*, 69 Me. 494; *Tyrrell v. Ward*, 102 Ill. 29; *Johnson v. Barrett*, 117 Ind. 551, 10 Am. St. Rep. 83; *Hammond v. Barker*, 61 N. H. 53.

<sup>324</sup> *Begein v. Brehm*, 123 Ind. 160; *Stillman's Ex'rs v. Stillman*, 21 N. J. Eq. 126; *Flagg v. Geltmacher*, 98 Ill. 293; *Risk v. Hoffman*, 69

tee does not assume the mortgage, but, the conveyance being stated to be subject to the mortgage, the mortgaged land becomes primarily liable for the debt.<sup>325</sup> It also exists in favor of a junior mortgagee,<sup>326</sup> and of one who purchases the mortgaged land without assuming its payment, and without any express statement that the land is subject to the mortgage.<sup>327</sup>

The right of subrogation also exists in favor of one who, though not personally liable, and without any interest in the land to protect, pays off the mortgage at the request and for the benefit of the person primarily liable, with an express or implied agreement that he shall have the benefit of the existing mortgage, or of a new one to be given.<sup>328</sup> So, one who loans money to the owner of the land in order to pay off the mortgage, and takes another mortgage in order to secure him, is entitled to the benefit of the prior mortgage if the new mortgage turns out to be defective, and there are no intervening incumbrances.<sup>329</sup>

Ind. 137; *Kinnear v. Lowell*, 34 Me. 299; *Ayers v. Dixon*, 78 N. Y. 318.

<sup>325</sup> *Greenwell v. Heritage*, 71 Mo. 459; *Jumel v. Jumel*, 7 Paige, N. Y. 591; *Johnson v. Zink*, 51 N. Y. 333, *Finch's Cas.* 1111; *Gerdine v. Menage*, 41 Minn. 417; *Kinnear v. Lowell*, 34 Me. 299.

<sup>326</sup> *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Ketchum v. Crippen*, 37 Cal. 223; *Ellsworth v. Lockwood*, 42 N. Y. 89, 96; *Ward v. Seymour*, 51 Vt. 320; *Weld v. Sabin*, 20 N. H. 533, 51 Am. Dec. 240; *Erwin v. Acker*, 126 Ind. 133; *Milligan's Appeal*, 104 Pa. St. 503; *Cobb v. Dyer*, 69 Me. 494.

<sup>327</sup> *Watson v. Gardner*, 119 Ill. 312; *Walker v. King*, 45 Vt. 525; *Braden v. Graves*, 85 Ind. 92; *Gleason v. Dyke*, 22 Pick. (Mass.) 390.

<sup>328</sup> *Gans v. Thieme*, 93 N. Y. 225; *Robertson v. Mowell*, 66 Md. 530; *Borland v. Meurer*, 139 Pa. St. 513; *Fears v. Albea*, 69 Tex. 437, 5 Am. St. Rep. 78; *Lockwood v. Marsh*, 3 Nev. 138; *Tolman v. Smith*, 85 Cal. 280.

<sup>329</sup> *Johnson v. Barrett*, 117 Ind. 551, 10 Am. St. Rep. 83; *Milholand v. Tiffany*, 64 Md. 455; *Patterson v. Birdsall*, 64 N. Y. 294, 21 Am. Rep. 609; *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740; *Cripp* (1248)

When land is sold under a foreclosure sale which turns out to be invalid, the purchaser who has paid the price is subrogated to the rights of the holder of the mortgage under which the sale took place.<sup>330</sup>

A payment of part only of the debt gives no right of subrogation, in the absence of express agreement therefor at the time of payment, or unless the balance of the debt has been previously paid, but the person so paying may take an assignment of part of the mortgage to secure him.<sup>331</sup>

The right does not exist in favor of a mere stranger who voluntarily pays off the mortgage, but by such payment the mortgage is extinguished.<sup>332</sup> Nor does it exist in favor of one who is primarily bound to pay the debt, whether he be the original mortgagor or a grantee of the property who has assumed payment of the mortgage.<sup>333</sup>

#### § 546. Marshaling of securities.

When one holds a mortgage on two tracts of land, and a second mortgage or other lien in the hands of another person covers but one of these tracts, the prior mortgagee may be

pen v. Chappel, 35 Kan. 495, 57 Am. Rep. 187; Wilton v. Mayberry, 75 Wis. 191, 17 Am. St. Rep. 193.

<sup>330</sup> Wilson v. Brown, 82 Ind. 471; Martin v. Kelly, 59 Miss. 652; Crosby v. Farmers' Bank of Andrew County, 107 Mo. 436; Johnson v. Robertson, 34 Md. 165; Jones v. McKenna, 4 Lea (Tenn.) 630; Brobst v. Brock, 10 Wall. (U. S.) 519.

<sup>331</sup> Commonwealth of Virginia v. State, 32 Md. 501, 545; Troxell v. Silverthorn, 45 N. J. Eq. 330; Kyner v. Kyner, 6 Watts (Pa.) 221; Sheldon, Subrogation, § 127.

<sup>332</sup> Guy v. De Uprey, 16 Cal. 195, 76 Am. Dec. 518; Van Winkle v. Williams, 38 N. J. Eq. 105; Arnold v. Green, 116 N. Y. 566; Rodman v. Sanders, 44 Ark. 504; Sheldon, Subrogation, § 241.

<sup>333</sup> Birke v. Abbott, 103 Ind. 1, 53 Am. Rep. 474; Goodyear v. Goodyear, 72 Iowa, 329; Willson v. Burton, 52 Vt. 394; Russell v. Pistor, 7 N. Y. 171, 57 Am. Dec. 509; McCabe v. Swap, 14 Allen (Mass.) 188; Butler v. Seward, 10 Allen (Mass.) 466; Probstfied v. Czizek, 37 Minn. 420.

compelled to resort first to the parcel not covered by the inferior lien, in order to leave the other, so far as possible, to the second lienor, and the latter is, in case the prior mortgagee does proceed against such other land in the first place, entitled to be subrogated to the rights of the prior mortgagee against the land covered by the first mortgage only, this being an application of the general equitable principle that one having two funds to satisfy his demands shall not, by his election, disappoint a person who has only one fund.<sup>334</sup> The principle will not be applied, however, if it will in any way prejudice the first mortgagee, the mortgagor, or third persons.<sup>335</sup>

#### § 547. Merger of mortgage.

The principle that, if the owner of the legal estate in the land becomes also the owner of a charge or lien thereon, the latter will be merged or extinguished, is frequently applied in the case of mortgages. Equity, however, applies the principle only when it accords with the actual or presumed intention of the parties.<sup>336</sup> This intention may be expressly stated in the conveyance of the land or the assignment of the incumbrance which brings the two interests together, or may be made apparent by the acts of the parties or the character of the conveyance, or the circumstances under which the conveyance is made.<sup>337</sup> When there is, as is frequently the

<sup>334</sup> 3 Pomeroy, Eq. Jur. § 1414; *Aldrich v. Cooper*, 2 White & T. Lead. Cas. Eq. 228, notes; *Hannah v. Carrington*, 18 Ark. 85; *Andreas v. Hubbard*, 50 Conn. 351; *White v. Polleys*, 20 Wis. 505; *Abbott v. Powell*, 6 Sawy. 91, Fed. Cas. No. 13; *Cheesebrough v. Milard*, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; *Brooks v. Maltledge*, 100 Ga. 367; *Ball v. Setzer*, 33 W. Va. 444.

<sup>335</sup> *Hudkins v. Ward*, 30 W. Va. 204, 8 Am. St. Rep. 22; *Boone v. Clark*, 129 Ill. 466; *McGinnis' Appeal*, 16 Pa. St. 445; *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430; 3 Pomeroy, Eq. Jur. § 1414.

<sup>336</sup> 2 Pomeroy, Eq. Jur. §§ 789-795.

<sup>337</sup> See *Longfellow v. Barnard*, 58 Neb. 612, 76 Am. St. Rep. 117;



case, nothing to show the intention, in such a case equity will usually presume that the owner of the two interests intended that they should merge, or the contrary, according as merger would be most for his benefit.<sup>338</sup> In case there is an incumbrance or equity intervening between the mortgage and the estate of the owner of the property, as, for example, when there is a second mortgage, it will be presumed that the owner of the premises and of the first mortgage did not intend that his mortgage should be merged in his estate in the land, since the effect of such merger would be to accord priority to the second mortgage or other intervening incumbrance.<sup>339</sup>

Merger does not result when the mortgage is assigned to one of two or more tenants in common of the mortgaged premises;<sup>340</sup> nor, under the modern statutes giving married

*Agnew v. Charlotte, C. & A. R. Co.*, 24 S. C. 18, 58 Am. Rep. 237; *Gresham v. Ware*, 79 Ala. 192; *Goodwin v. Keney*, 47 Conn. 486; *Smith v. Roberts*, 91 N. Y. 470; *Campbell v. Knights*, 24 Me. 332; *Matthews v. Jones* (Neb.) 66 N. W. 622.

The expressed or implied intention which controls is, it seems, that existing at the time the two estates come together, and not that which may be afterwards formed. *Given v. Marr*, 27 Me. 212; 2 Pomeroy, Eq. Jur. § 792.

<sup>338</sup> *Factors' & Traders' Ins. Co. v. Murphy*, 111 U. S. 738; *Adams v. Angell*, 5 Ch. Div. 634; *Mallory v. Hitchcock*, 29 Conn. 127; *Clark v. Glos*, 180 Ill. 556, 72 Am. St. Rep. 223; *Bullard v. Leach*, 27 Vt. 491; *Den d. Van Wagenen v. Brown*, 26 N. J. Law, 196; *Watson v. Dundee Mortgage & Trust Inv. Co.*, 12 Or. 474; *Birke v. Abbott*, 103 Ind. 1, 53 Am. Rep. 474; *Patterson v. Mills*, 69 Iowa, 755; *Knowles v. Lawton*, 18 Ga. 476, 63 Am. Dec. 290; *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Duncan v. Drury*, 9 Pa. St. 332, 49 Am. Dec. 565; *Aetna Life Ins. Co. v. Corn*, 89 Ill. 170; *Silliman v. Gam-mage*, 55 Tex. 365.

<sup>339</sup> *Lowman v. Lowman*, 118 Ill. 582; *Stantons v. Thompson*, 49 N. H. 272; *Duffy v. McGuiness*, 13 R. I. 595; *Hanlon v. Doherty*, 109 Ind. 37; *Denzler v. O'Keefe*, 34 N. J. Eq. 361; *Ryer v. Gass*, 130 Mass. 227.

<sup>340</sup> *Titworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Barker v. Flood*, 103 Mass. 474

women control of their real estate, does the fact that the owners of the mortgage and the mortgaged property are husband and wife cause a merger.<sup>341</sup>

A merger will always be enforced when to keep the mortgage alive would involve a fraud or wrong upon some innocent party, since equity undertakes to prevent a merger only when this is necessary for purposes of justice.<sup>342</sup> There is necessarily a merger if an owner of the mortgaged land, who is under an obligation to pay the debt, acquires the title to the mortgage, since he cannot keep the mortgage alive to the prejudice of other persons;<sup>343</sup> and in such a case, even if he takes an assignment of the mortgage, the mortgage is extinguished.<sup>344</sup>

#### VI. FORECLOSURE.

The right to foreclose accrues upon the breach of a condition of the mortgage as ascertained by the terms of the mortgage, or of the instrument secured thereby, or both.

In the absence of a statute expressly naming the period within which suit to foreclose may be brought, the limitation period

<sup>341</sup> *Bean v. Boothby*, 57 Me. 295; *Power v. Lester*, 23 N. Y. 527; *Bemis v. Call*, 10 Allen (Mass.) 512.

<sup>342</sup> *Andrus v. Vreeland*, 29 N. J. Eq. 394; *Miller v. Whelan*, 153 Ill. 555; *Gardner v. Astor*, 3 Johns. Ch. (N. Y.) 53, 8 Am. Dec. 465; 2 *Pomeroy*, Eq. Jur. § 794.

<sup>343</sup> *Mickles v. Townsend*, 18 N. Y. 575; *Brown v. Lapham*, 3 Cush. (Mass.) 551.

<sup>344</sup> *Jones v. Lamar*, 34 Fed. 454; *Bunch v. Grave*, 111 Ind. 351; *Brown v. Lapham*, 3 Cush. (Mass.) 554; *Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509; *Lilly v. Palmer*, 51 Ill. 331; *Theisen v. Dayton*, 82 Iowa, 74; *Burnham v. Dorr*, 72 Me. 198; *Frey v. Vanderhoof*, 15 Wis. 436.

One who has conveyed the mortgaged premises with a covenant against incumbrances cannot pay off the mortgage and take an assignment, or otherwise keep it alive, in direct violation of his covenant. *Jones v. Lamar* (C. C.) 34 Fed. 454; *Mickles v. Townsend*, 18 N. Y. 575; *Butler v. Seward*, 10 Allen (Mass.) 466.

applicable to actions to recover land is adopted in equity. In the majority of states, the right to foreclose is not affected by the fact that the personal remedy on the obligation secured is barred by the statute of limitations.

Foreclosure in this country is usually by means of an equitable proceeding to obtain a sale of the land, and payment from the proceeds of the obligation secured. The same end is frequently attained by a sale under a power in the mortgage, without any judicial proceeding. In most of the New England states foreclosure is usually by entry or writ of entry, which gives the mortgagee the land itself, as in the "strict foreclosure" of equity, now but seldom employed outside of one or two states. Scire facias is, in one state, the recognized mode of foreclosure. The personal liability of the mortgagor can be enforced only by a distinct action at law, except in those states where a decree for a deficiency is by statute allowed in the foreclosure proceeding.

#### § 548. Accrual of the right to foreclose.

Foreclosure is the proceeding by which a mortgagor or other owner of an interest in the land is, upon his failure to comply with the stipulations of the mortgage or of the instrument secured thereby, deprived of his right to discharge the land from the lien of the mortgage.<sup>345</sup>

The right to foreclose the mortgage accrues upon a non-compliance with a stipulation, the performance of which the mortgage is intended to secure, and not before.<sup>346</sup>

Usually, the mortgage, or the instrument secured thereby, provides that a default in the payment of an installment of principal or interest shall cause the whole principal to immediately become due, at the mortgagee's option, thus au-

<sup>345</sup> Though we usually speak of the "foreclosure of a mortgage," what is really foreclosed is the right to redeem or discharge the mortgage. See *Shepard v. Richardson*, 145 Mass. 32.

<sup>346</sup> See *Trayser v. Trustees of Indiana Asbury University*, 39 Ind. 556; *James v. Fisk*, 9 Smedes & M. (Miss.) 144, 47 Am. Dec. 111.

thorizing a foreclosure for the whole amount upon such a default.<sup>347</sup> The institution of a suit to foreclose for the whole amount is regarded as a sufficient exercise by the mortgagee of such an option, without any previous declaration by the mortgagee of his desire that the total principal be considered due.<sup>348</sup>

There may be, by express stipulation, a right to foreclose upon the mortgagor's failure to pay taxes on the land,<sup>349</sup> or upon any other default by the mortgagor, as in the payment of insurance, which is calculated to affect the security. A demand of performance after default is not necessary before beginning suit to foreclose.<sup>350</sup>

#### § 549. Bar by lapse of time.

The time within which a suit to foreclose a mortgage must be brought is sometimes expressly named in the statute.<sup>351</sup> In the absence of such a provision, equity has usually adopted the period necessary to bar a legal action to recover land, as

<sup>347</sup> *Bushfield v. Meyer*, 10 Ohio St. 334; *Adams v. Essex*, 1 Bibb (Ky.) 149, 4 Am. Dec. 623; *Noyes v. Anderson*, 124 N. Y. 175; *Schooley v. Romain*, 31 Md. 574, 100 Am. Dec. 87; *Atkinson v. Walton*, 162 Pa. St. 219; *Parker v. Banks*, 79 N. C. 480; *Brown v. McKay*, 151 Ill. 315; *Baldwin v. Van Vorst*, 10 N. J. Eq. 577; *Noell v. Gaines*, 68 Mo. 649; *Fletcher v. Daugherty*, 13 Neb. 224; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510; *Heath v. Hall*, 60 Ill. 344. And the statute in a number of states expressly authorizes foreclosure for the whole on nonpayment of an installment. 1 *Stimson's Am. St. Law*, § 1929.

<sup>348</sup> *Hewitt v. Dean*, 91 Cal. 5; *Brown v. McKay*, 151 Ill. 315; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510; *Lowenstein v. Phelan*, 17 Neb. 429; *Atkinson v. Walton*, 162 Pa. St. 219; *Dunton v. Sharpe*, 70 Miss. 850. Compare *Schoonmaker v. Taylor*, 14 Wis. 313; *English v. Carney*, 25 Mich. 178.

<sup>349</sup> *Pope v. Durant*, 26 Iowa, 233; *Condon v. Maynard*, 71 Md. 601; *Stancilift v. Norton*, 11 Kan. 218; 2 *Jones, Mortgages*, § 117.

<sup>350</sup> *Ferris v. Spooner*, 102 N. Y. 10; *Clemens v. Luce*, 101 Cal. 432.

<sup>351</sup> 1 *Stimson's Am. St. Law*, § 1928; *Wood, Limitations*, § 223; 2 *Dembitz, Land Titles*, § 189.

determining whether the right of foreclosure has been lost by lapse of time.<sup>352</sup>

The theory usually adopted is that equity will, after such a lapse of time, presume that the claim secured by the mortgage has been satisfied.<sup>353</sup> This presumption may be rebutted by showing that, within this period, the mortgagor or his representative in interest has acknowledged the existence of the liability by making a partial payment thereon, or otherwise,<sup>354</sup> and, according to a few decisions, the presumption may be rebutted by evidence of other facts, as that there was a relationship between the mortgagor and mortgagee.<sup>355</sup> Occasionally, the lapse of the statutory period has been re-

<sup>352</sup> *Christophers v. Sparke*, 2 Jac. & W. 223; *Hughes v. Edwards*, 9 Wheat. (U. S.) 497; *Hall v. Denckla*, 28 Ark. 506; *Howland v. Shurtleff*, 2 Metc. (Mass.) 26, 35 Am. Dec. 384; *Nevitt v. Bacon*, 32 Miss. 212, 66 Am. Dec. 609; *Jackson v. Wood*, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; *Martin v. Bowker*, 19 Vt. 526; *Tripe v. Marcy*, 39 N. H. 439; *Nevitt v. Bacon*, 32 Miss. 212, 66 Am. Dec. 609; *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78; *Bassett v. Monte Christo Gold & Silver Min. Co.*, 15 Nev. 293; *Martin v. Stoddard*, 127 N. Y. 61; *Haskell v. Bailey*, 22 Conn. 569; *Richmond v. Aiken*, 25 Vt. 324.

<sup>353</sup> 2 Story, Eq. Jur. § 1028b; *Hughes v. Edwards*, 9 Wheat. (U. S.) 497; *Pitzer v. Burns*, 7 W. Va. 63; *Howland v. Shurtleff*, 2 Metc. (Mass.) 26, 35 Am. Dec. 384; *Hammonds v. Hopkins*, 3 Yerg. (Tenn.) 528; *Downs v. Looy*, 28 N. J. Eq. 55; *Tripe v. Marcy*, 39 N. H. 439; *Belmont v. O'Brien*, 12 N. Y. 394; *Brown v. Hardecastle*, 63 Md. 484; *Kellogg v. Dickinson*, 147 Mass. 432; *Joy v. Adams*, 26 Me. 330.

<sup>354</sup> *Cross v. Allen*, 141 U. S. 528; *Brown v. Hardecastle*, 63 Md. 484; *Locke v. Caldwell*, 91 Ill. 417; *Kellogg v. Dickinson*, 147 Mass. 432; *Kendall v. Tracy*, 64 Vt. 522; *Blair v. Carpenter*, 75 Mich. 167; 2 Jones, Mortgages, § 1198.

<sup>355</sup> *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685, 23 Am. Dec. 748; *Jackson v. Wood*, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; *Knight v. McKinney*, 84 Me. 107; *Howland v. Shurtleff*, 2 Metc. (Mass.) 26, 35 Am. Dec. 384; *Philbrook v. Clark*, 77 Me. 176; *Hale v. Pack's Ex'rs*, 10 W. Va. 145. But see *Cheever v. Perley*, 11 Allen (Mass.) 584; *Kellogg v. Dickinson*, 147 Mass. 432, to the effect that there must be some act of recognition of the claim to rebut the presumption.



garded, not as raising a presumption of payment or satisfaction, but as barring the foreclosure proceeding by analogy to the bar in an action to recover land.<sup>356</sup>

—— Bar of obligation secured.

By the weight of authority, the expiration of the period allowed for bringing suit on the personal obligation secured by the mortgage does not bar suit to foreclose.<sup>357</sup> In some states, however, a different view is taken, and the running of the statute against the personal obligation defeats the right of foreclosure.<sup>358</sup>

<sup>356</sup> *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78. See *Bacon v. McIntire*, 8 Metc. (Mass.) 87.

A few cases apparently adopt this theory to the extent of holding that, since the defendant's possession must be adverse in order to bar an action to recover land, and since a mortgagor's possession is not adverse to the mortgagee (see ante, § 443), the right of foreclosure is not barred, as against a mortgagor in possession, even by the lapse of the statutory period after default, unless the mortgagor's possession has become adverse by a repudiation of the mortgagee's rights. *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572 (semble); *Lewis v. Schwenn*, 93 Mo. 26, 3 Am. St. Rep. 511; *Combs v. Goldsworthy*, 109 Mo. 151; *Chouteau v. Riddle*, 110 Mo. 366; *Hodgdon v. Heidman*, 66 Iowa, 645; *Ellsberry v. Boykin*, 65 Ala. 336.

<sup>357</sup> *Pratt v. Huggins*, 29 Barb. (N. Y.) 277, *Kirchwey's Cas.* 753; *Hulbert v. Clark*, 128 N. Y. 295; *Bizzell v. Nix*, 60 Ala. 281, 31 Am. Rep. 38; *Belknap v. Gleason*, 11 Conn. 160, 27 Am. Dec. 721; *Browne v. Browne*, 17 Fla. 607, 35 Am. Rep. 96; *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687; *Demuth v. Old Town Bank of Baltimore*, 85 Md. 315, 60 Am. St. Rep. 322; *Myer v. Beal*, 5 Or. 130; *Crain v. Paine*, 4 Cush. (Mass.) 483, 50 Am. Dec. 807; *Cookes v. Culbertson*, 9 Nev. 199; *Fisher's Ex'r v. Mossman*, 11 Ohio St. 42; *Wood v. Augustine*, 61 Mo. 46; *Norton v. Palmer*, 142 Mass. 433; *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78; *Richmond v. Aiken*, 25 Vt. 324.

<sup>358</sup> *Coles v. Withers*, 33 Grat. (Va.) 186; *Lord v. Morris*, 18 Cal. 482, *Kirchwey's Cas.* 763; *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259, *Kirchwey's Cas.* 769; *Pollock v. Maison*, 41 Ill. 516; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Smith v. Foster*, 44 Iowa, 442.

**§ 550. Strict foreclosure in equity.**

Before the right of redemption was recognized by courts of equity, no foreclosure was necessary, since the mere breach of the condition vested an absolute estate in the mortgagee. When, however, the right of redemption came to be recognized, it was, in justice to the mortgagee, necessary that a time be limited within which this right should be exercised, and chancery accordingly adopted the practice of issuing a decree, upon the filing of a bill by the mortgagee, cutting off the right of redemption if not exercised by a time named.<sup>359</sup> Such a decree, in effect vesting the title to the land in the mortgagee unless there was a redemption within a period named, was at one time the only method of foreclosure; but since the introduction of a foreclosure by sale of the land, it has acquired the distinctive name of "strict foreclosure."<sup>360</sup>

This method of foreclosure has not been favored in this country, since it is liable to result in forfeiting the whole property to the mortgagee on account of a debt considerably less than the value of the property. It is however, recognized in a number of states as an appropriate form of proceeding under special circumstances, when not calculated to prejudice either of the parties in interest;<sup>361</sup> and it is considered especially applicable in order to cut off the rights of subsequent incumbrancers or lien holders.<sup>362</sup> In states where

<sup>359</sup> 4 Kent's Comm. 181; Coote, Mortgages (4th Ed.) 990.

<sup>360</sup> See 4 Kent's Comm. 181; 2 Jones, Mortgages, §§ 1538-1570; *Lansing v. Goelet*, 9 Cow. (N. Y.) 346; *Clark v. Reyburn*, 8 Wall. (U. S.) 318.

<sup>361</sup> *Farrell v. Parlier*, 50 Ill. 274; *Stephens v. Bichnell*, 27 Ill. 444. 81 Am. Dec. 242; *Illinois Starch Co. v. Ottawa Hydraulic Co.*, 125 Ill. 237; *Moulton v. Cornish*, 138 N. Y. 133; *Bresnahan v. Bresnahan*, 46 Wis. 385.

<sup>362</sup> *Jefferson v. Coleman*, 110 Ind. 515; *Bolles v. Duff*, 43 N. Y. 469; *Shaw v. Hersey*, 48 Iowa, 468; *Ross v. Boardman*, 22 Hun (N. Y.) 527, *Finch's Cas.* 1118.

the statute absolutely requires a sale of the land, a strict foreclosure is of course not permissible.<sup>363</sup> It is apparently a usual method of foreclosure in Connecticut and Vermont.<sup>364</sup>

A decree of strict foreclosure vests the absolute title in the mortgagee,<sup>365</sup> but the mortgage debt is not necessarily satisfied, and the mortgagor's personal liability for any excess in the amount of the mortgage over the value of the land may be enforced in an action at law.<sup>366</sup>

### § 551. Foreclosure by entry.

Akin to strict foreclosure in equity, as vesting in the mortgagee an absolute estate in the land itself, is foreclosure by the peaceable entry of the mortgagee upon the premises, and his retention of possession thereafter for a specified time. This is provided for by the statutes of Maine, Massachusetts, New Hampshire, and Rhode Island.<sup>367</sup>

The entry must be in the presence of witnesses, whose certificate as to the entry is filed for record, and this serves as notice to the owner and persons interested in the land.<sup>368</sup>

<sup>363</sup> See *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Browne v. Browne*, 17 Fla. 607, 623, 35 Am. Rep. 96.

<sup>364</sup> *Waters v. Hubbard*, 44 Conn. 340; *Devereaux v. Fairbanks*, 52 Vt. 587; Gen. St. Conn. § 3023; St. Vt. 1894, §§ 978, 979; 2 *Jones, Mortgages*, § 1326.

<sup>365</sup> *Waters v. Hubbard*, 44 Conn. 340; *Ellis v. Leek*, 127 Ill. 60; *Brainard v. Cooper*, 10 N. Y. 356; *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141; *Champion v. Hinkle*, 45 N. J. Eq. 162.

<sup>366</sup> *Hatch v. White*, 2 Gall. 152, Fed. Cas. No. 6,209; *Spencer v. Harford*, 4 Wend. (N. Y.) 386; *Vasant v. Allmon*, 23 Ill. 30; *Hazard v. Robinson*, 15 R. I. 226; *Devereaux v. Fairbanks*, 52 Vt. 587; *Paris v. Hulett*, 26 Vt. 308. See *Windham County Sav. Bank v. Himes*, 55 Conn. 433.

<sup>367</sup> 1 *Stimson's Am. St. Law*, § 1921. See 2 *Jones, Mortgages*, c. 28.

<sup>368</sup> *Thompson v. Kenyon*, 100 Mass. 108; *Bennett v. Conant*, 10 Cush. (Mass.) 163; *Snow v. Pressey*, 82 Me. 552; *Thompson v. Ela*, 58 N. H. 490.

The statutes require that the entry be peaceable, and, if it is opposed, judicial proceedings must be resorted to.<sup>369</sup>

The severity of foreclosure in this way without a sale is mitigated by provisions of the statutes giving a considerable time after entry in which the property may be redeemed; this being three years, except in New Hampshire, where it is one year.<sup>370</sup> The effect of the foreclosure is to cancel the mortgage debt to the extent of the value of the land at the time at which the foreclosure is completed.<sup>371</sup>

### § 552. Foreclosure by writ of entry.

In Maine, Massachusetts, and New Hampshire, the mortgagee may bring a writ of entry for the purpose of foreclosure. This proceeding, though in form a common-law action, has, when used for the purpose of foreclosure, the general characteristics of an equity proceeding, the amount due being ascertained on equitable principles, and the judgment being that, if this sum is not paid within a certain time, the mortgagee shall be put into possession of the land.<sup>372</sup> When so put into possession, the mortgagee is in the position of a mortgagee who has peaceably entered without action, and possession by him for the length of time required in such case, as stated in the preceding section, will give him an indefeasible title.<sup>373</sup>

<sup>369</sup> Rev. Laws Mass. 1902, c. 187, § 1; Rev. St. Me. 1883, c. 90, § 3; Gen. Laws R. I. 1896, c. 207, § 3; Pub. St. N. H. 1901, c. 139, § 14.

<sup>370</sup> 1 Stimson's Am. St. Law, § 1921.

<sup>371</sup> *Hatch v. White*, 2 Gall. 152, Fed. Cas. No. 6,209; *Morse v. Merriitt*, 110 Mass. 458; *Hunt v. Stiles*, 10 N. H. 466; *Flint v. Winter Harbor Land Co.*, 89 Me. 420; *Newall v. Wright*, 3 Mass. 138, 3 Am. Rep. 98.

<sup>372</sup> *Holbrook v. Bliss*, 9 Allen (Mass.) 69; *Ladd v. Putnam*, 79 Me. 568; 2 Jones, Mortgages, c. 29.

<sup>373</sup> 1 Stimson's Am. St. Law, § 1925 (A) (3), (C) (2); 2 Jones, Mortgages, § 1306.

**§ 553. Equitable proceeding for sale.**

The most usual method of foreclosure in this country is by a suit in equity, or by a civil proceeding under the code in the nature of a suit in equity, to obtain a sale of the land, and payment of the mortgage debt from the proceeds.<sup>374</sup> The decree in such a proceeding finds the amount due on the mortgage debt, this being determined either by the court or by a clerk, master, or other officer;<sup>375</sup> and also orders a sale of the land by an officer, who is usually designated by the statute.<sup>376</sup>

If the mortgagor has conveyed portions of the property to different owners, the decree should provide for their sale in the inverse order of alienation, in accordance with the rule of liability previously stated.<sup>377</sup> In any case, the court should, if it seems most for the interests of either party, and not incompatible with the interests of the other, order a sale of the land in separate parcels, instead of *en masse*,<sup>378</sup> and in some states such discretion is to be exercised by the officer making the sale.<sup>379</sup>

<sup>374</sup> 2 Jones, Mortgages, § 1317; Wiltsie, Mortgage Foreclosure, § 3; 1 Stimson's Am. St. Law, § 1925.

<sup>375</sup> Wernwag v. Brown, 3 Blackf. (Ind.) 457, 26 Am. Dec. 433; Wilson Sewing Mach. Co. v. Rutledge, 60 Iowa, 39; Tompkins v. Wiltberger, 56 Ill. 385; Hoy v. Bramhall, 19 N. J. Eq. 74; Collier v. Ervin, 2 Mont. 335; Vaughn v. Nims, 36 Mich. 297; Kelly v. Searling, 4 Abb. Pr. (N. Y.) 354.

<sup>376</sup> See Heyer v. Deaves, 2 Johns. Ch. (N. Y.) 154; State v. Holiday, 35 Neb. 327; Mayer v. Wick, 15 Ohio St. 548.

<sup>377</sup> See ante, 530.

<sup>378</sup> Livingston v. Mildrum, 19 N. Y. 440; Pancoast v. Duval, 26 N. J. Eq. 445; Macomb v. Prentis, 57 Mich. 225.

If the mortgage covers distinct tracts of land, these should be sold separately. Patton v. Smith, 113 Ill. 499; Brake v. Brownlee, 91 Ind. 359; Schilling v. Lintner, 43 N. J. Eq. 444; Cunningham v. Cassidy, 17 N. Y. 276.

<sup>379</sup> Jones v. Gardner, 57 Cal. 641; Stone v. Missouri Guarantee Savings & Building Ass'n, 58 Ill. App. 78; Hughes v. Riggs, 84 Md. 502.



The decree of sale cannot be attacked collaterally for irregularities therein which do not affect the jurisdiction, and, until reversed, it is binding on all parties to the suit.<sup>380</sup> An innocent purchaser at the sale is not affected by a subsequent reversal of the decree, though the rule is different if the purchaser is the mortgagee, or some other party to the proceeding, and a sale to him is invalidated by the reversal.<sup>381</sup>

The sale, to be valid, must, in most jurisdictions, be confirmed by the court,<sup>382</sup> and a deed to the purchaser is usually, if not invariably, made by the officer conducting the sale.<sup>383</sup> Any surplus proceeds of sale remaining after the payment of the debt secured by the mortgage are thereafter paid to the mortgagor, or, if there are subsequent purchasers or incumbrancers, such surplus proceeds belong to them, usually in the order in which their interests were acquired.<sup>384</sup>

The completed sale vests in the purchaser whatever title the mortgagor had when he executed the mortgage,<sup>385</sup> and thus cuts off the interests of any subsequent purchasers or in-

<sup>380</sup> *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Woolery v. Grayson*, 110 Ind. 149; *Burford v. Rosenfield*, 37 Tex. 42.

<sup>381</sup> *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Phillips v. Benson*, 82 Ala. 500; *Gott v. Powell*, 41 Mo. 416; *Hubbell v. Broadwell's Adm'rs*, 8 Ohio, 120; *Adams v. Odom*, 74 Tex. 206; *Lambert v. Livingston*, 131 Ill. 161; 17 Am. & Eng. Enc. Law (2d Ed.) 1017-1019.

<sup>382</sup> *Williamson v. Berry*, 8 How. (U. S.) 495; *Lathrop v. Nelson*, 4 Dill. 194, Fed. Cas. No. 8,111; *Wells v. Rice*, 34 Ark. 346; *Hart v. Burch*, 130 Ill. 426; *Allen v. Poole*, 54 Miss. 323; *Woehler v. Endter*, 46 Wis. 301.

<sup>383</sup> 2 *Jones, Mortgages*, §§ 1652-1655; *Jackson v. Warren*, 32 Ill. 331; *Mitchell v. Bartlett*, 51 N. Y. 447.

<sup>384</sup> See 2 *Jones, Mortgages*, §§ 1684-1698; *Wiltzie, Mortgage Foreclosure*, cc. 32, 33.

<sup>385</sup> *King v. McCully*, 38 Pa. St. 76; *Davis v. Connecticut Mut. Life Ins. Co.*, 84 Ill. 508; *Christ Protestant Episcopal Church v. Mack*, 93 N. Y. 488, 45 Am. Rep. 260, *Kirchwey's Cas.* 304; *Poweshiek County v. Dennison*, 36 Iowa, 244, 14 Am. Rep. 521; *Champion v. Hinkle*, 45 N. J. Eq. 162.

cumbrancers, who were made parties to the proceeding, and deprives them of all right of redemption.<sup>386</sup> Persons whose interests and claims were prior to the mortgage are not affected by the sale, and the purchaser acquires, as against them, no better title than the mortgagor had at the time of making the mortgage.<sup>387</sup> If, however, a prior mortgagee is made a party to the proceeding, and the bill contains sufficient allegations, he is barred by the decree, the bill in such case being one both to foreclose the second mortgage and to redeem from the first mortgage.<sup>388</sup>

In a number of states, the statute gives the mortgagor and other persons interested a right to redeem for a certain period after the sale, such period varying in different states from six months to two years.<sup>389</sup> This right is purely the creation of statute, and is to be carefully distinguished from the right of redemption in equity before foreclosure.

**§ 554. Parties to proceeding—Persons interested in mortgage.**

The mortgagee, if he has not assigned his rights, is, of course, the proper party plaintiff in a foreclosure suit. An

<sup>386</sup> *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Frische v. Kramer's Lessee*, 16 Ohio, 125, 47 Am. Dec. 368; *Christ Protestant Episcopal Church v. Mack*, 93 N. Y. 488; *Shaw v. Heisey*, 48 Iowa, 468; *Gamble v. Horr*, 40 Mich. 561.

<sup>387</sup> *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Banning v. Bradford*, 21 Minn. 308, 18 Am. Rep. 398; *Bozarth v. Landers*, 113 Ill. 181; *Emigrant Industrial Sav. Bank v. Goldman*, 75 N. Y. 127; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Iowa County Sup'rs v. Mineral Point R. Co.*, 24 Wis. 93, 121; *City & County of San Francisco v. Lawton*, 18 Cal. 465; *Summers v. Bromley*, 28 Mich. 125. And see 1 *Stimson's Am. St. Law*, § 1927.

<sup>388</sup> *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747; *Hagan v. Walker*, 14 How. (U. S.) 29, 37; *Jerome v. McCarter*, 94 U. S. 734; *Haines v. Beach*, 3 Johns. Ch. (N. Y.) 459; *Hudnit v. Nash*, 16 N. J. Eq. 550; *Cronin v. Hazeltine*, 3 Allen (Mass.) 324.

<sup>389</sup> See 1 *Stimson's Am. St. Law*, § 1944; 11 *Am. & Eng. Enc. Law* (2d Ed.) pp. 213, 226, 232.

assignee of the mortgage debt, with or without the mortgage, may foreclose, and is the proper person to do so, since he is the person interested in realizing on the security;<sup>390</sup> and one to whom the mortgage and the debt are assigned merely as collateral security may foreclose,<sup>391</sup> as may his assignor, since the latter is still interested in the mortgage debt.<sup>392</sup> One who is entitled to but part of the mortgage debt, as being the assignee of one of the notes secured, or otherwise,<sup>393</sup> and likewise a person who is subrogated to the rights of the mortgagee, may foreclose.<sup>394</sup>

One who has assigned the mortgage absolutely cannot institute a foreclosure suit, since he is no longer a party in interest;<sup>395</sup> nor can one to whom the mortgage alone is assigned, without the debt.<sup>396</sup>

In cases in which all the persons interested in the mortgage debt do not join as plaintiffs in the institution of the proceeding, those not so joining must be made parties de-

<sup>390</sup> *Bendey v. Townsend*, 109 U. S. 665; *Center v. Planters' & Merchants' Bank*, 22 Ala. 743; *Carper v. Munger*, 62 Ind. 481; *Holmes v. French*, 70 Me. 341; *Merritt v. Bartholick*, 36 N. Y. 44.

<sup>391</sup> *Hunter v. Levan*, 11 Cal. 11; *Chicago & Great Western Railroad Land Co. v. Peck*, 112 Ill. 408, 439; *Bard v. Poole*, 12 N. Y. 495; *McKinney v. Miller*, 19 Mich. 142; *Brown v. Tyler*, 8 Gray (Mass.) 135. See *Chew v. Brumagen*, 13 Wall. (U. S.) 497.

<sup>392</sup> *Norton v. Warner*, 3 Edw. Ch. (N. Y.) 106; *Hopson v. Aetna Axle & Spring Co.*, 50 Conn. 597; *Consolidated Nat. Bank of San Diego v. Hayes*, 112 Cal. 75; *Wells v. Wells*, 53 Vt. 1.

<sup>393</sup> *Goodall v. Mopley*, 45 Ind. 355; *Pugh v. Holt*, 27 Miss. 461; *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 500; *Utz v. Utz*, 34 La. Ann. 752; 2 Jones, Mortgages, § 1378.

<sup>394</sup> *Risk v. Hoffman*, 69 Ind. 137; *Wood v. Smith*, 51 Iowa, 156; *Shinn v. Shinn*, 91 Ill. 477; *Hamilton v. Dobbs*, 19 N. J. Eq. 227. See ante, § 345.

<sup>395</sup> *Cutler v. Clementson* (C. C.) 67 Fed. 409; *Barraque v. Manuel*, 7 Ark. 516; *Call v. Leisner*, 23 Me. 25; *Pryor v. Wood*, 31 Pa. St. 142. See *McGuffey v. Finley*, 20 Ohio, 474; *Gould v. Newman*, 6 Mass. 239.

<sup>396</sup> *Bulkley v. Chapman*, 9 Conn. 5; *Pope v. Jacobus*, 10 Iowa, 263; *Ellison v. Daniels*, 11 N. H. 274; *Merritt v. Bartholick*, 36 N. Y. 44; 4 Kent's Comm. 194.

fendant, in order to cut off their interests, and pass a clear title to the mortgagee or purchaser at the mortgage sale.<sup>397</sup> Accordingly, one who has assigned the mortgage as collateral security,<sup>398</sup> or received such an assignment,<sup>399</sup> and joint owners with the plaintiff of the mortgage, including owners of other notes secured thereby,<sup>400</sup> must be made parties in order to cut off their rights against the land.

— — Personal representatives of mortgage claimant.

Upon the death of the owner of the mortgage debt, the title thereto, with the right to proceed by foreclosure, passes to his personal representatives, and not to his heirs, and consequently the former are the proper persons to foreclose.<sup>401</sup>

In the case of a mortgage owned jointly by more than one person, the doctrine of "survivorship" applies, and, on the death of one, the survivor or survivors may foreclose without making the representatives of the deceased owner parties to the suit.<sup>402</sup>

<sup>397</sup> *Mangels v. Donau Brewing Co.* (C. C.) 53 Fed. 513; *Pine v. Shannon*, 30 N. J. Eq. 501; *Goodall v. Mopley*, 45 Ind. 355.

<sup>398</sup> *Woodruff v. Depue*, 14 N. J. Eq. 168; *Dalton v. Smith*, 86 N. Y. 176.

<sup>399</sup> *Plowman v. Riddle*, 14 Ala. 169.

<sup>400</sup> *Goodall v. Mopley*, 45 Ind. 355; *Rankin v. Major*, 9 Iowa, 297; *Johnson v. Brown*, 31 N. H. 405; *Pettibone v. Edwards*, 15 Wis. 95; *Bacon v. O'Keefe*, 13 Wash. 655; *Myers v. Wright*, 33 Ill. 285; *Delespine v. Campbell*, 45 Tex. 628; *Brown v. Bates*, 55 Me. 520.

<sup>401</sup> *Thornborough v. Baker*, 3 Swanst. 628; *White v. Rittenmyer*, 30 Iowa, 268; *Felch v. Hooper*, 20 Me. 163; *Newton v. Stanley*, 28 N. Y. 61; *Griffin v. Lovell*, 42 Miss. 402; *Miller v. Donaldson*, 17 Ohio, 264; *Buck v. Fischer*, 2 Colo. 182; *Roath v. Smith*, 5 Conn. 133; *Douglass v. Durin*, 51 Me. 121.

<sup>402</sup> *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Lannay v. Wilson*, 30 Md. 536; *Blake v. Sanborn*, 8 Gray (Mass.) 154. But that such representatives must be made parties, see *Mutual Life Ins. Co. of New York v. Sturges*, 32 N. J. Eq. 678.

— Persons interested in land.

Since the purpose of a foreclosure proceeding is to cut off rights of redemption, all those persons having such rights should be made parties. Accordingly, as a general rule, all persons who are in any way interested in the mortgaged land, and whose rights were acquired after the mortgage, should be made parties, in order that their rights of redemption may be completely extinguished by the foreclosure.<sup>403</sup>

All owners of liens of any kind subsequent to the mortgage, including subsequent mortgagees and judgment creditors, should be made parties.<sup>404</sup>

The failure to make any particular lienor a party does not invalidate the foreclosure proceeding for all purposes, but only as regards such person, who still has the right to redeem.<sup>405</sup> A failure to make the owner of an estate in the land a party has, on the other hand, the effect not only of rendering the proceeding ineffective for the purpose of cutting off his right of redemption, but renders it utterly nugatory for the purpose of divesting his estate, and a purchaser at the sale is in such case merely subrogated to the rights of the mortgagee as against such owner.<sup>406</sup>

<sup>403</sup> *Clark v. Reyburn*, 8 Wall. (U. S.) 318; *Noyes v. Hall*, 97 U. S. 34; *Ballard v. Carter*, 71 Tex. 161.

<sup>404</sup> *Alexander v. Greenwood*, 24 Cal. 506; *Goodman v. White*, 26 Conn. 317; *Wiley v. Ewing*, 47 Ala. 423; *Strang v. Allen*, 44 Ill. 428; *Hosford v. Johnson*, 74 Ind. 479; *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *Harris v. Hooper*, 50 Md. 537; *Brainard v. Cooper*, 10 N. Y. 356; *Peabody v. Roberts*, 47 Barb. (N. Y.) 91.

<sup>405</sup> *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Porter v. Kilgore*, 32 Iowa, 379; *Frische v. Kramer's Lessee*, 16 Ohio, 125, 47 Am. Dec. 368; *Harris v. Hooper*, 50 Md. 537; *Anson v. Anson*, 20 Iowa, 55, 89 Am. Dec. 514; *Kay v. Whittaker*, 44 N. Y. 565; *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *Johnson v. Hosford*, 110 Ind. 572; *Johnson v. Hambleton*, 52 Md. 378; *Cram v. Cotrell*, 48 Neb. 646.

<sup>406</sup> *Watson v. Spence*, 20 Wend. (N. Y.) 260; *Boggs v. Hargrave*, 16 Cal. 559, 76 Am. Dec. 561; *Stark v. Brown*, 12 Wis. 572, 78 Am.



The mortgagor need not be made a party if he has transferred all his interest, unless it is desired to obtain a personal judgment against him.<sup>407</sup>

On the death of an owner of the mortgaged land, his heirs must be made parties;<sup>408</sup> or, in case the mortgaged land is devised, his devisees.<sup>409</sup>

The wife of the mortgagor or of a subsequent purchaser of the property, if entitled to dower, should be made a party if her right of dower is subordinate to the mortgage, as where she joined therein;<sup>410</sup> and the wife's right of homestead cannot generally be foreclosed unless she is a party to the foreclosure proceeding.<sup>411</sup>

Dec. 762; *Ohling v. Luitjens*, 32 Ill. 23; *Watts v. Julian*, 122 Ind. 124; *Terrell v. Allison*, 21 Wall. (U. S.) 292; *Berlack v. Halle*, 22 Fla. 236, 1 Am. St. Rep. 185; *Barrett v. Blackmar*, 47 Iowa, 565; *Williams v. Terrell*, 54 Ga. 462; *Bailey v. Myrick*, 36 Me. 50; *Lenox v. Reed*, 12 Kan. 223; *Raynor v. Selmes*, 52 N. Y. 579; *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *Carpenter v. Ingalls*, 3 S. D. 49; *Hall v. Huggins*, 19 Ala. 200; *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Reed v. Marble*, 10 Paige (N. Y.) 409; *South Carolina Mfg. Co. v. Price*, 4 Rich. (S. C.) 338.

<sup>407</sup> *Boutwell v. Steiner*, 84 Ala. 307, 5 Am. St. Rep. 375; *Johnson v. Monell*, 13 Iowa, 300; *Davis v. Hardy*, 76 Ind. 272; *Miller v. Thompson*, 34 Mich. 10; *Andrews v. Stelle*, 22 N. J. Eq. 478; *Bigelow v. Bush*, 6 Paige (N. Y.) 343; *Buchanan v. Monroe*, 22 Tex. 537.

<sup>408</sup> *Hunt v. Acre*, 28 Ala. 580; *Kiernan v. Blackwell*, 27 Ark. 235; *Lane v. Erskine*, 13 Ill. 501; *White v. Rittenmyer*, 30 Iowa, 268; *Britton v. Hunt*, 9 Kan. 228; *Abbott v. Godfroy's Heirs*, 1 Mich. 178; *Isler v. Koonce*, 83 N. C. 55; *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762.

In some states, however, under particular statutes, it is sufficient to make the personal representative a party. See 9 Enc. Pl. & Pr. 311.

<sup>409</sup> *Chew v. Hyman* (C. C.) 7 Fed. 7; *Chadbourn v. Johnston*, 119 N. C. 282.

<sup>410</sup> *Leonard v. Villars' Adm'r*, 23 Ill. 377; *McArthur v. Franklin*, 15 Ohio St. 485, 16 Ohio St. 193; *Swan v. Wiswall*, 15 Pick. (Mass.) 126; *Byrne v. Taylor*, 46 Miss. 95. See *Merchants' Bank v. Thomson*, 55 N. Y. 7. And see ante, § 190.

<sup>411</sup> *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Morris v. Ward*, 5 Kan. 246; *Larson v. Reynolds*, 13 Iowa, 584. Compare *Townsend* (1266)

Persons asserting adverse claims to the mortgaged land, alleged to be paramount to the rights of the mortgagee, are not proper parties to the foreclosure proceeding, since the object of such proceeding is to cut off the right of redemption of persons whose rights are subject to the mortgage, and not to determine the title to the property.<sup>412</sup> So, upon a foreclosure proceeding by a junior mortgagee, it is not proper, as a general rule, to make a prior mortgagee or other prior lienor a party, since his rights are not subject to the mortgage, but the land will be sold subject to his lien.<sup>413</sup> If, however, the prior lienor is made a party, and the complainant specifically asks that his claim be first paid from the proceeds of the sale, and he consents thereto, the land may be sold free from his lien.<sup>414</sup> Such a proceeding is, as against the prior lienor, in effect a bill to redeem from his lien.

#### § 555. Power of sale.

Owing to the delays and expense incident to foreclosure by bill in equity, and the difficulty of making proper parties

*Sav. Bank of New Haven v. Epping*, 3 Woods, 390, Fed. Cas. No. 14,120.

<sup>412</sup> *Dial v. Reynolds*, 96 U. S. 340; *City & County of San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187; *Hambrick v. Russell*, 86 Ala. 199; *Banning v. Bradford*, 21 Minn. 308, 18 Am. Rep. 398; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Summers v. Bromley*, 28 Mich. 125; *Kinsley v. Scott*, 58 Vt. 470; *Bogey v. Shute*, 57 N. C. 174; *Strobe v. Downer*, 13 Wis. 10, 80 Am. Dec. 709, note. See authorities cited in *King v. Mason*, 89 Am. Dec. 434, note.

<sup>413</sup> *Tome v. Merchants' & Mechanics' Permanent Building & Loan Co.*, 34 Md. 12; *Hancock v. Hancock*, 22 N. Y. 568; *Krutsinger v. Brown*, 72 Ind. 466; *White v. Holman*, 32 Ark. 753; *Strobe v. Downer*, 13 Wis. 10, 80 Am. Dec. 709, note; *Hague v. Jackson*, 71 Tex. 761; *Hagan v. Walker*, 14 How. (U. S.) 29, 37.

<sup>414</sup> *Emigrant Industrial Sav. Bank v. Goldman*, 75 N. Y. 127; *Raymond v. Holborn*, 23 Wis. 57; *Waters v. Bossel*, 58 Miss. 602; *Clark v. Prentice*, 3 Dana (Ky.) 468; ante, note 388.

thereto, the device has been largely resorted to of inserting in the mortgage a "power of sale," as it is called, being a provision authorizing the mortgagee to sell the property, without resort to a judicial proceeding, in case of default. In this country, such powers were in general use earlier than in England, and they have been recognized as valid, even in the absence of any statute authorizing them.<sup>415</sup> There are, however, in many states, statutes expressly authorizing or recognizing such powers.<sup>416</sup> In a few states, on the other hand, it is provided by statute that a power of sale in a mortgage shall not authorize a sale otherwise than by decree of court, or there is an implication to that effect from a requirement that foreclosure shall be by judicial proceedings.<sup>417</sup>

The question whether such a power of sale in the mortgagee is terminated by the death of the mortgagor before its exercise has been the subject of a number of decisions. For the purpose of considering this question, it is important to distinguish between those jurisdictions in which the mortgage vests the legal title in the mortgagee and those in which it does not. When the mortgagee has the legal title, the power of sale answers to the definition of a power "coupled with an interest," as being "engrafted on an estate in the thing," and as being exercised by the donee of the power, not in the name of the donor of the power, but in the name of the donee.<sup>418</sup> In other words, it is not a mere "power of

<sup>415</sup> *Walthall's Ex'rs v. Rives*, 34 Ala. 91; *Bloom v. Van Rensselaer*, 15 Ill. 503; *Eaton v. Whiting*, 3 Pick (Mass.) 484; *Clark v. Condit*, 18 N. J. Eq. 358; *Hyman v. Devereux*, 63 N. C. 624; *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141; *First Nat. Bank of Butte v. Bell Silver & Copper Min. Co.*, 8 Mont. 32; *Very v. Russell*, 65 N. H. 646.

<sup>416</sup> See 1 *Stimson's Am. St. Law*, § 1924; 2 *Jones, Mortgages*, c. 39; *Wiltzie, Mortgage Foreclosure*, c. 34.

<sup>417</sup> 1 *Stimson's Am. St. Law*, § 1924 (D); 2 *Jones, Mortgages*, §§ 1733-1740, 1747, 1748.

<sup>418</sup> *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 175.

agency," but is what we have referred to as an "equitable power," being a power in the holder of the bare legal title to convey the equitable interest.<sup>419</sup> Consequently, it confers a right of a proprietary character, which is not divested by the death of the person who conferred the right,—the mortgagor.<sup>420</sup> In those jurisdictions, however, in which the legal title does not pass to the mortgagee, but remains in the mortgagor, the power cannot be regarded as a power coupled with an interest, but is merely a "power of agency" in the mortgagee, which cannot be exercised in his own name, because he has no title to the land, and, being exercisable only in the name of the mortgagor, cannot be exercised after the latter's death.<sup>421</sup> But even in this latter class of juris-

<sup>419</sup> Edwards, Prop. Land, 209. "When the legal fee is vested in the mortgagee, a power of sale given to him operates in equity only, and is in effect a trust." 2 Hayes, Conveyancing (5th Ed.) 141. note. See ante, § 276.

In *Hall v. Bliss*, 18 Mass. 554, 19 Am. Rep. 476, Gray, C. J., assumes that a power in the mortgagee to sell on default operates as a legal power of appointment, taking effect under the statute of uses, such as is described ante, §§ 275-277. And the same idea is indicated in the decisions cited post, note 426. If this were so, the mere sale would operate as an appointment of the use, and the legal title would vest in the vendee without any conveyance by the mortgagee,—a view which has never been adopted apart from statute. See 2 Jones, Mortgages, § 1889 et seq. Furthermore, a mortgage in the ordinary form would seem to be inadequate for the creation of a power of appointment, it not raising any seisin to serve uses, and not containing any declaration of uses. Compare Sugden, Powers, 149; Farwell, Powers, 3.

<sup>420</sup> *Hudgins v. Morrow*, 47 Ark. 515; *Berry v. Skinner*, 30 Md. 567; *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234; *McGuire v. Van Pelt*, 55 Ala. 344; *Varnum v. Meserve*, 8 Allen (Mass.) 158; *Bergen v. Bennett*, 1 Caines Cas. (N. Y.) 1; *Strother v. Law*, 54 Ill. 413; *Carter v. Slocomb*, 122 N. C. 475, 65 Am. St. Rep. 714.

<sup>421</sup> *Johnson v. Johnson*, 27 S. C. 309, 13 Am. St. Rep. 636; *Wilkins v. McGehee*, 86 Ga. 764; *Baum v. Raley*, 53 S. C. 32; *Lockett v. Hill*, 1 Woods, 552, Fed. Cas. No. 8,443.

In Texas, though the legal title does not there vest in the mortgagee, it has been decided that the power of sale survives the death



dictions the mortgagor cannot, by voluntary act, revoke the power.<sup>422</sup>

The power will usually pass to the assigns of the mortgagee when the latter has the legal title,<sup>423</sup> while it will not do so, it would seem, in jurisdictions in which the legal title remains in the mortgagor. Moreover, in the former class of states, the mortgagee's personal representative, as the successor to the mortgagee's interest upon his death, is regarded as entitled to exercise the power in his place and stead,<sup>424</sup> while in the latter class the power must be regarded as personal to the mortgagee, like any other power of agency.<sup>425</sup>

It is usually stated that the purchaser under the power of sale acquires the title which the mortgagor had at the time of making the mortgage, unaffected by any subsequent trans-

of the mortgagor. *Rogers' Heirs v. Watson*, 81 Tex. 400; *Robertson's Adm'x v. Paul*, 16 Tex. 472. These cases merely adopt, without discussion, the statements made in other states that the power is "coupled with an interest." They cannot be supported under the doctrine of *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 175.

<sup>422</sup> *Mutual Loan & Banking Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317. "Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law." *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 174. So in the case of a deed of trust vesting the legal title in the trustee. *More v. Calkins*, 95 Cal. 435.

<sup>423</sup> *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *McGuire v. Van Pelt*, 55 Ala. 344 (by stat.); *Pickett v. Jones*, 63 Mo. 195; *Sanford v. Kane*, 133 Ill. 199, 23 Am. St. Rep. 602; *Harnickell v. Orndorff*, 35 Md. 341; *Chilton v. Brooks*, 71 Md. 450. See *Randall v. Hazelton*, 12 Allen (Mass.) 412. Occasionally, the right of the mortgagee's assigns to exercise the power is made dependent on the express mention of "assigns" in the creation of the power. *Dolbear v. Norduft*, 84 Mo. 619; *Chilton v. Brooks*, 71 Md. 450. And see *Pardee v. Lindley*, 31 Ill. 174. Such is the rule in England. 2 Robins, Mortgages, 890.

<sup>424</sup> *Lewis v. Wells*, 50 Ala. 198; *Harnickell v. Orndorff*, 35 Md. 341; *Collins v. Hopkins*, 7 Iowa, 463; *Merrin v. Lewis*, 90 Ill. 505.

<sup>425</sup> See *Barrick v. Horner*, 78 Md. 253, 44 Am. St. Rep. 283.



fers or liens.<sup>426</sup> This is unquestionably the case when the mortgage vests the legal title in the mortgagee, since such legal title, vested in the mortgagee for certain purposes, including that of sale, cannot be divested by any equity subsequently accruing in favor of a third person. When, however, the mortgage gives the mortgagee merely a lien, since the sale under the power is merely the exercise of a power of agency, and it is, in legal effect, the act of the principal, it can, it would seem, in the absence of a statute providing otherwise, transfer only such title as the mortgagor has at the time of sale.<sup>427</sup>

— **Mode of procedure.**

The statute usually contains provisions as to the notice of sale, to be given by publication or otherwise, and also as to the manner of conducting the sale, and these are controlling, even when in conflict with the terms of the power in the mortgage.<sup>428</sup> These latter control, however, in the absence of an overruling statutory provision, and they must be strictly complied with.<sup>429</sup> There is usually a requirement in the statute

<sup>426</sup> 2 Jones, Mortgages, § 1897; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; *Sims v. Field*, 66 Mo. 111; *Torrey v. Cook*, 116 Mass. 163; *Brown v. Smith*, 116 Mass. 108; *Aiken v. Bridgeford*, 84 Ala. 295; *Powers v. Andrews*, 84 Ala. 289; *Bull's Petition*, 15 R. I. 534; *Woonsocket Sav. Institution v. American Worsted Co.*, 13 R. I. 255.

These decisions, while correct in their results, are based on the view, erroneous, it would seem, that the power of sale in the mortgage is a power to appoint a use. See ante, note 419.

<sup>427</sup> This difficulty is, in some states, obviated by statute, as in New York (see Thomas, Mortgages, § 1139) and Wisconsin (*Nau v. Brunette*, 79 Wis. 664).

<sup>428</sup> *Butterfield v. Farnham*, 19 Minn. 85 (Gil. 38); *Webb v. Hoefler*, 53 Md. 187; *Pierce v. Grimley*, 77 Mich. 273; *Bragdon v. Hatch*, 77 Me. 433.

<sup>429</sup> *Ormsby v. Tarascon*, 3 Litt. (Ky.) 404; *Thornburg v. Jones*, 36 Mo. 514; *Bigler v. Waller*, 14 Wall. (U. S.) 297; *Hall v. Towne*, 45 Ill. 493; *Cranston v. Crane*, 97 Mass. 459.

or in the mortgage that the sale shall be by public auction, but, in the absence of such express requirement, the sale may be private.<sup>430</sup>

In the absence of a statutory provision or an express stipulation in the mortgage to the contrary, a mortgagee cannot usually purchase at a sale made by him under such a power, since he bears, so far as concerns the exercise of such a power, at least a *quasi* trust relation towards others interested in the land, and a sale to him will be set aside upon an application, made with reasonable promptness, by the owner of the land or other person interested therein.<sup>431</sup>

The power usually provides that the mortgagee shall make a conveyance to the person purchasing at the sale, and this he may no doubt do when the legal title is in him under the mortgage.<sup>432</sup> When, however, by the law of the state, he is not the holder of the legal title, he cannot, unless authorized by statute, convey it to another, and he must make such a conveyance merely as the representative or attorney of the mortgagor, and in the latter's name.<sup>433</sup> Sometimes the

<sup>430</sup> *Davey v. Durrant*, 1 De Gex & J. 535; *Mowry v. Sanborn*, 68 N. Y. 153, 160. See *Griffin v. Marine Co. of Chicago*, 52 Ill. 130.

<sup>431</sup> *Hyndman v. Hyndman*, 19 Vt. 9, *Kirchwey's Cas.* 582; *Ezzel v. Watson*, 83 Ala. 120; *Blockley v. Fowler*, 21 Cal. 326, 82 Am. Dec. 747; *Allen v. Ranson*, 44 Mo. 263, 100 Am. Dec. 282; *Hall v. Towne*, 45 Ill. 493; *Shew v. Call*, 119 N. C. 450, 56 Am. St. Rep. 678; *Howard v. Ames*, 3 Metc. (Mass.) 308; *Very v. Russell*, 65 N. H. 646; *Dyer v. Shurtleff*, 112 Mass. 165; *Mutual Loan & Banking Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317; *McCall v. Mash*, 89 Ala. 487, 18 Am. St. Rep. 145.

If the mortgage in terms authorizes the mortgagee to purchase, he may do so. *Knox v. Armistead*, 87 Ala. 511, 13 Am. St. Rep. 65; *Ellenbogen v. Griffey*, 55 Ark. 268; *Mutual Loan & Banking Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317; *Montague v. Dawes*, 12 Allen (Mass.) 397; *Elliott v. Wood*, 45 N. Y. 71.

<sup>432</sup> *Tripp v. Ide*, 3 R. I. 51; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; *Munn v. Burges*, 70 Ill. 604.

<sup>433</sup> *Dendy v. Waite*, 36 S. C. 569; *Williams v. Washington*, 40 S. C. 457.

power provides expressly that he shall make the conveyance as the attorney of the mortgagor.<sup>434</sup>

The statute sometimes requires that a certificate or affidavit by the mortgagee as to the proceedings leading up to the sale shall be recorded by him. Such a provision is, however, regarded as directory only, and not mandatory.<sup>435</sup>

Any surplus over and above the mortgage debt must be paid over to the mortgagor or to other persons having interests in the property subsequent to the mortgage, as in the case of a sale under decree of court.<sup>436</sup>

#### —Sale under deed of trust.

In some parts of the country, particularly in the South, a "deed of trust" is commonly used to secure debts, the land being thereby conveyed to a trustee, usually with a provision that he reconvey to the grantor if the debt be paid, and that, in case of nonpayment, he sell the land, and apply the proceeds of the sale in paying the debt. Such an instrument is commonly used in all parts of the country when the persons whose claims are to be secured are numerous, or when they are unknown, and it is universally used to secure issues of bonds by corporations.

In some of the states, where a mortgagee does not acquire the legal title, a deed of trust of this character is regarded as merely in effect a mortgage, and as consequently not vesting any legal title in the trustee, so called, and this apparently without reference to whether the parties intended that

<sup>434</sup> *Cranston v. Crane*, 97 Mass. 459, 93 Am. Dec. 106; *Speer v. Hadduck*, 31 Ill. 439; *Mulvey v. Gibbons*, 87 Ill. 367.

<sup>435</sup> See 1 *Stimson's Am. St. Law*, § 1924; *Tuthill v. Tracy*, 31 N. Y. 157; *Field v. Gooding*, 106 Mass. 310; *Mundy v. Monroe*, 1 Mich. 68.

<sup>436</sup> *Cope v. Wheeler*, 41 N. Y. 303; *Buttrick v. Wentworth*, 6 Allen (Mass.) 79; *Newhall v. Lynn Five Cents Sav. Bank*, 101 Mass. 428, 3 Am. Rep. 387; *Stoevers v. Stoevers*, 9 Serg. & R. (Pa.) 434; *Reynolds v. Hennessy*, 15 R. I. 215. See 1 *Stimson's Am. St. Law*, § 1924e.

he should have the legal title.<sup>437</sup> In others of such states, the grantee in the deed is regarded as actually having the legal title.<sup>438</sup> But even in this latter class of states, presumably the conveyance would be construed as not conveying the legal title upon a clear expression of intention to that effect, and, generally speaking, the question whether a particular instrument is to be regarded as merely a mortgage, or as a conveyance of the legal title to a trustee for the purpose of selling the land in certain contingencies in order to pay a debt or debts, would seem to be properly a question of the construction of the language of the particular instrument, and this view is quite ordinarily adopted. The fact that the conveyance is to the creditor, though named as a trustee, rather than to a third person, is usually regarded as conclusive that the instrument is a mortgage,<sup>439</sup> and the use of a provision ordinarily found in a mortgage, that the conveyance shall be void if the debt is paid at maturity, is apparently evidence to the same effect;<sup>440</sup> while, on the other

<sup>437</sup> *McLane v. Paschal*, 47 Tex. 365; *Hurley v. Estes*, 6 Neb. 386; *Thompson v. Marshall*, 21 Or. 171. Where this view is taken, the trustee's power of sale would seem to be subject to the same infirmities as attend a power of sale in a mortgage in states where the mortgagee has no legal title. See ante, § 454.

<sup>438</sup> *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Bateman v. Burr*, 57 Cal. 480; *Soutter v. Miller*, 15 Fla. 625; *Devin v. Hendershott*, 32 Iowa, 192; *Stephens v. Clay*, 17 Colo. 489. See *Reece v. Allen*, 10 Ill. 236, 48 Am. Dec. 336.

<sup>439</sup> *Marvin v. Titsworth*, 10 Wis. 320; *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 859. And see *Sargent v. Howe*, 21 Ill. 148; *Eaton v. Whiting*, 3 Pick. (Mass.) 484. Contra, *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128.

<sup>440</sup> See *Austin v. Sprague Mfg. Co.*, 14 R. I. 464; *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162, 181; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 283; *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94; *Turner v. Watkins*, 31 Ark. 429. But see *Reece v. Allen*, 10 Ill. 236, 48 Am. Dec. 336. So, in Ohio, the instrument is merely a mortgage if it contains a condition that it shall be void if the debt is paid when due; while it is a deed of trust, vesting all the (1274)

hand, the fact that the instrument names no time at which the trustee shall exercise his power of sale, or at which the right of redemption shall terminate, tends to show that it is not a mortgage.<sup>441</sup> Such a conveyance, however, even though regarded as strictly a deed of trust, as distinguished from a mortgage, may, as having some of the elements of a mortgage, be within the scope of a statute in reference to sales under a power in a mortgage.<sup>442</sup>

The same rule applies to a purchase by the trustee selling under the power as to a sale by a mortgagee, and a sale to himself may be set aside.<sup>443</sup>

### § 556. *Scire facias*.

In Pennsylvania, foreclosure is by a writ of *scire facias*, issued twelve months after default, requiring the mortgagor, his heirs or executors, to show cause why the mortgaged land should not be taken in execution for the mortgage, and, on the rendition of judgment in favor of the mortgagee, a writ of *levari facias* issues, under which the land is sold.<sup>444</sup> Foreclosure by *scire facias* is also allowed by the statutes of two or three other states, but it is not apparently a usual method of procedure.<sup>445</sup>

### § 557. *Stipulation for attorney's fees*.

A stipulation in the mortgage or instrument evidencing the debt secured that, upon foreclosure, there shall be in-

legal estate in the trustee, if it is in form an absolute conveyance for the purpose of raising money to pay the debt if it is not paid as agreed. *Martin v. Alter*, 42 Ohio St. 94.

<sup>441</sup> *Shepard v. Richardson*, 145 Mass. 32; 2 Perry, Trusts, 602d.

<sup>442</sup> *Shillaber v. Robinson*, 97 U. S. 75; *Cross v. Fombey*, 54 Ark. 179; *Wolfe v. Dowell*, 13 Smedes & M. (Miss.) 103.

<sup>443</sup> *Cunningham v. Macon & B. R. Co.*, 156 U. S. 400; *Williamson v. Stone*, 128 Ill. 129; *Lass v. Sternberg*, 50 Mo. 124.

<sup>444</sup> 1 Brightley, *Purd. Dig.* § 169, p. 659, et seq.

<sup>445</sup> *Laws Del.* 1893, p. 843; 2 Starr & Curt. Ann. St. Ill. c. 95, § 18; *Gen. St. N. J.* p. 2103, §§ 4, 5.



cluded in the decree the amount of the attorney's fees in the foreclosure proceeding, is valid, in the majority of states,<sup>446</sup> though in some a different view is taken.<sup>447</sup> The amount of the attorney's fees named in such stipulation is not, however, it has been held, conclusive upon the court, and it may allow such less sum as may seem reasonable.<sup>448</sup>

### § 558. Enforcement of personal liability.

As previously stated, the mortgage is usually given to secure a debt for which the mortgagor is personally liable, and the enforcement of this liability becomes a matter of importance in case the amount of the debt cannot be realized from the mortgaged property. It has always been considered, in the absence of a statutory provision to the contrary, that the mortgagee may enforce his different rights at the same time, pursuing concurrently his suit in equity to foreclose and his action at law on the note or bond evidencing the mortgagor's personal liability.<sup>449</sup> Likewise, recovery in an action on the debt does not affect the right to subsequently foreclose;<sup>450</sup> nor does the completion of foreclosure prevent

<sup>446</sup> *Tholen v. Duffy*, 7 Kan. 405, *Kirchwey's Cas.* 493; *Barry v. Guild*, 126 Ill. 439; *McAllister's Appeal*, 59 Pa. St. 204; *Pierce v. Kneeland*, 16 Wis. 672; *Mason v. Luce*, 116 Cal. 232; *Bowie v. Hall*, 69 Md. 434, 9 Am. St. Rep. 433; *Miner v. Paris Exchange Bank*, 53 Tex. 559.

<sup>447</sup> *Thomasson v. Townsend*, 10 Bush (Ky.) 114; *Kittermaster v. Brossard*, 105 Mich. 219, 55 Am. St. Rep. 437; *Security Co. of Hartford v. Eyer*, 36 Neb. 507; *Jarvis v. Southern Grocery Co.*, 63 Ark. 225. See *State v. Taylor*, 10 Ohio, 378.

<sup>448</sup> *Daly v. Maitland*, 88 Pa. St. 384, 32 Am. Rep. 457, *Kirchwey's Cas.* 495. See *Gibson v. Southwestern Land Co.*, 89 Wis. 49. Contra, under statute, *Scholey v. De Mattos*, 18 Wash. 504.

<sup>449</sup> *Burnell v. Martin*, 2 Doug. 417; *Booth v. Booth*, 2 Atk. 343; *Gilman v. Illinois & Mississippi Telegraph Co.*, 91 U. S. 603, 616; *Very v. Watkins*, 18 Ark. 546; *Coit v. Fitch*, *Kirby (Conn.)* 254, 1 Am. Dec. 20; *Vansant v. Allmon*, 23 Ill. 30; *Copperthwait v. Dummer*, 18 N. J. Law, 258; *Brown v. Cascaden*, 43 Iowa, 103.

<sup>450</sup> *Connecticut Mut. Life Ins. Co. v. Jones*, 1 McCrary, 388, 8 Fed. 303; *Thornton v. Pigg*, 24 Mo. 249; *Wahl v. Phillips*, 12 Iowa, 81. See ante, § 549.

a subsequent suit to recover on the personal liability, unless the result of the foreclosure is to satisfy the debt.<sup>451</sup>

— In foreclosure proceeding.

Formerly, in case the proceeds of the sale of the property were insufficient to pay the obligation, the only mode in which the mortgagee could enforce the mortgagor's personal liability was by a separate action at law against the mortgagor.<sup>452</sup> Of recent years, however, statutes have been passed in many states authorizing the entry in the foreclosure proceeding of a personal judgment or decree for the deficiency against the mortgagor or other person liable for the debt;<sup>453</sup> and in such states the mortgagee is usually subject to restrictions of a more or less positive character upon his right to institute separate proceedings to enforce the personal liability and to foreclose.<sup>454</sup>

<sup>451</sup> *Globe Ins. Co. v. Lansing*, 5 Cow. (N. Y.) 380, 15 Am. Dec. 474; *Morgan v. Sherwood*, 53 Ill. 171; *Marston v. Marston*, 45 Me. 412; *Stark v. Mercer*, 3 How. (Miss.) 377; *Leland v. Loring*, 10 Metc. (Mass.) 122; *Paris v. Hulett*, 26 Vt. 308. See, also, ante, § 550.

<sup>452</sup> *Hunt v. Lewis*, 4 Stew. & P. (Ala.) 138; *Johnson v. Shepard*, 35 Mich. 115; *Stark v. Mercer*, 3 How. (Miss.) 377; *Fithian v. Monks*, 43 Mo. 502, 519; *Klapworth v. Dressler*, 13 N. J. Eq. 62, 78 Am. Dec. 69; *Dunkley v. Van Buren*, 3 Johns. Ch. (N. Y.) 330.

<sup>453</sup> 1 *Stimson's Am. St. Law*, § 1926; 9 *Enc. Pl. & Pr.* 454; 2 *Jones, Mortgages*, c. 38.

<sup>454</sup> The statute sometimes requires the mortgage security to be exhausted before an action is brought to enforce the personal liability. See *Bartlett v. Cottle*, 63 Cal. 366; *Johnson v. Lewis*, 13 Minn. 364 (Gil. 337). In some states, by statute, during the pendency of an action at law for the recovery of the debt, a foreclosure suit cannot be maintained, and a subsequent foreclosure suit is allowed only if execution on a judgment for the debt is returned unsatisfied. 1 *Stimson's Am. St. Law*, § 1932 (B). In other states, while a foreclosure suit is pending, an action on the debt cannot be brought except by leave of court. 1 *Stimson's Am. St. Law*, § 1932 (D). And the statute sometimes forbids the bringing of a subsequent action on the debt, after a decree of foreclosure, the creditor having a right to a personal decree in the foreclosure proceeding. *Code Civ. Proc. N. Y.* § 1628.

## CHAPTER XXXVI.

### EQUITABLE LIENS.

- § 559. General considerations.
- 560. Express charges on land.
- 561. Agreements for security (equitable mortgages).
- 562. Lien for improvements.
- 563. Lien for owelty of partition.
- 564. Implied lien of grantor (vendor's lien).
- 565. Express lien of grantor.
- 566. Vendor's lien before conveyance.
- 567. Vendee's lien.

An equitable lien is a right in equity to have a personal claim paid, in case of necessity, by the sale of specific land. It may result from: (1) An express charge by the owner of the land of a certain sum thereon. (2) An agreement that the land shall be security for a certain sum. (3) The making of improvements on land by one mistakenly believing himself the owner thereof. (4) The creation of a claim for owelty of partition. (5) It also exists, in some states, upon land conveyed to secure purchase money remaining unpaid. (6) It may, in any state, be created for this purpose by agreement. (7) It also exists in favor of a vendee to secure payments made by him under the contract before receiving a conveyance.

#### § 559. General considerations.

At common law there was no lien upon a thing owned by one person in favor of another except when accompanied by possession, and, furthermore, there could be no lien upon land, but only on things of a personal nature.<sup>1</sup> In equity, however, there are certain rights in regard to land, as well

<sup>1</sup> 2 Spence, Eq. Jur. 796.

as to personalty, not based on possession, yet of a character analogous to common-law liens, and known as "equitable liens." These rights consist of personal obligations upon the owners of land, which equity will enforce against the land, and which will follow the land into whosoever hands it may pass, until it reaches those of a purchaser for value without notice.<sup>2</sup>

### § 560. Express charges on land.

An "equitable lien" is created by provisions, in a conveyance *inter vivos* or in a will, charging the land with the payment of debts or legacies.<sup>3</sup> So, land may be charged by will, or in a family settlement, with the payment of an annuity,<sup>4</sup> or the support of some person other than the owner.<sup>5</sup>

<sup>2</sup> Pomeroy, Eq. Jur. §§ 165-167, 1233 et seq.; article by Prof. C. C. Langdell, 1 Harv. Law Rev. 65, 66, 70.

Equitable liens do not confer "proprietary" or "real" rights, but, as stated in the text, they merely constitute a means by which equity enforces a personal obligation. Consequently, the owner of the obligation has, in theory, no rights in the land until the decree subjecting the land to his claim. See 1 Harv. Law Rev. 65, 66; *Gilman v. Brown*, 1 Mason, 221, Fed. Cas. No. 5,441; *Hutton v. Moore*, 26 Ark. 382; *Sparks v. Hess*, 15 Cal. 186. It is on this theory, apparently, that a vendor's lien is in some states regarded as personal to the vendor, and not assignable (see post, § 564), and, on the same theory, the right to enforce the lien may well be regarded as barred by the fact that the statutory period has run against the claim (*Borst v. Corey*, 15 N. Y. 505, *Kirchwey's Cas.* 758), whatever be the rule in the case of a formal mortgage (see ante, § 549).

<sup>3</sup> See 2 Jarman, Wills, 1387 et seq; Bigelow, Wills, 312. Equitable liens of this class, as well as other such liens, are admirably treated in the work on Equity Jurisprudence by the late John Norton Pomeroy (volume 3, §§ 1233-1267), on which the present chapter is, to a considerable extent, based.

<sup>4</sup> *In re Tucker* [1893] 2 Ch. 323; *Merritt v. Bucknam*, 78 Me. 504; *Gallaher v. Herbert*, 117 Ill. 160; *Glenn v. Spry*, 5 Md. 110; *Hines v. Hines*, 95 N. C. 482; *In re Pierce's Estate*, 56 Wis. 560.

<sup>5</sup> *Bell v. Watkins*, 104 Ga. 345; *Donnelly v. Edelen*, 40 Md. 117; *Commons v. Commons*, 115 Ind. 162; *Outland v. Outland*, 118 N. C. 138; *Dickson v. Field*, 77 Wis. 439.

Under the common-law rule that lands were not liable for the simple contract debts of a decedent, the question frequently arose whether his will expressed an intention to the contrary,—that is, charged his land with the payment of debts in favor of creditors. With the change in the law, making land as well as personalty liable for debts of the decedent,—a rule which prevails in all the states,—these questions have become of comparatively little importance, so far as the creditor is concerned. The question may still arise, however, whether, under a particular will, the land is charged with debts, so as to render it primarily liable for the payment thereof, thus reversing the ordinary rule that the personalty is the primary fund for that purpose. This concerns, not the creditor, but the devisees or heirs of the land on the one side, and the legatees or other persons entitled to share in the personalty on the other. The question also frequently arises whether land is charged with the payment of a particular legacy, so as to make it liable for this purpose, either before the personalty, which is ordinarily alone so liable, or *pari passu* with the personalty. In the absence of such a charge, the legacy must abate in case of insufficiency of personal assets.

Since land is ordinarily the primary fund for the payment of both debts and legacies, the presumption is always to that effect, and a clear intention is necessary to charge the land.<sup>6</sup> An intention that the land shall be charged with the payment of debts or legacies may be expressly stated, as by use of the word “charge,” or by a devise to A. “on condition that” he pay a certain debt or legacy.<sup>7</sup> Moreover, such an intention

<sup>6</sup> Bigelow, Wills, 313; Wright v. Denn, 10 Wheat. (U. S.) 204; In re Powers, 124 N. Y. 361; Heslop v. Gatton, 71 Ill. 528; Owens v. Claytor, 56 Md. 129; Shenk v. Shenk, 150 Pa. St. 521; Lee v. Lee, 88 Va. 805.

<sup>7</sup> McFait's Appeal, 8 Pa. St. 290; Merritt v. Buckman, 78 Me. 504; Gardenville Permanent Loan Ass'n v. Walker, 52 Md. 452; Sistrunk v. Ware, 69 Ala. 273; Couch v. Eastham, 29 W. Va. 784. See Baker's Appeal, 59 Pa. St. 313.



is usually inferred from the fact that, in the same clause with a devise of land, there is a direction to the devisee to pay a debt or a legacy.<sup>8</sup>

In this country the use of general words directing the payment of debts does not usually have the effect of charging the debts on land devised, such words being found in most wills, and being merely a direction for the doing of what the law compels.<sup>9</sup> In England, on the other hand, a mere direction by the testator that his debts shall be paid charges the land with the debts, though a direction that they shall be paid by his executors charges only the land devised to such executors.<sup>10</sup>

A legacy is charged on land by a devise of the land "after" the payment of such legacy.<sup>11</sup> Likewise, if, after the gift of a pecuniary legacy or legacies, there is a gift of the "residue" or "remainder" of testator's property, thereby blending the real and personal property into one fund, the legacy or legacies are charged upon the land, since the term "residue" or "remainder" could in such case only refer to what remains after the payment of the previous gifts.<sup>12</sup>

<sup>8</sup> Bigelow, Wills, 318; *Potter v. Gardner*, 12 Wheat. (U. S.) 498; *Brown v. Knapp*, 79 N. Y. 136, 143; *Henry v. Griffis*, 89 Iowa, 543; *Thayer v. Finnegan*, 134 Mass. 62, 45 Am. Rep. 285; *Merrill v. Bickford*, 65 Me. 118; *Dudgeon v. Dudgeon*, 87 Mo. 218; *Chase v. Warner*, 106 Mich. 695; *Carter v. Worrell*, 96 N. C. 358, 60 Am. Rep. 420; *Yearly v. Long*, 40 Ohio St. 27; *Buchanan v. Lloyd*, 88 Md. 642; *Wyckoff v. Wyckoff*, 49 N. J. Eq. 344.

<sup>9</sup> *Starke v. Wilson*, 65 Ala. 576; *Decker v. Decker*, 121 Ill. 341; *Hamilton v. Smith*, 110 N. Y. 159; *Harmon v. Smith* (C. C.) 38 Fed. 482; *White v. Kauffman*, 66 Md. 92. Contra, *Tuohy v. Martin*, 2 MacArthur (D. C.) 572; *Bishop v. Howarth*, 59 Conn. 455, 465.

<sup>10</sup> 2 Jarman, Wills, 1390; Theobald, Wills (5th Ed.) 725, 726; Hawkins, Wills (2d Am. Ed.) 282.

<sup>11</sup> *Pond v. Allen*, 15 R. I. 171; *Pendleton v. Kinney*, 65 Conn. 222; *Smith v. Cairns*, 92 Tex. 667. See *Smith v. Fellows*, 131 Mass. 20.

<sup>12</sup> *Greville v. Browne*, 7 H. L. Cas. 689; *In re Dyson* [1896] 2 Ch. 720; *Lewis v. Darling*, 16 How. (U. S.) 1; *Turner v. Laird*, 68 Conn.

**§ 561. Agreements for security (equitable mortgages).**

In equity, any agreement in writing, made upon a valid consideration, however informal, by which an intention is shown that certain land shall be a security for the payment of money, creates an equitable lien upon that land.<sup>13</sup> To such an agreement the term "equitable mortgage" is frequently applied, the instrument being, for most purposes, at least, equivalent to a regular mortgage in the view of a court of equity, though utterly null and void at law. Accordingly, one may create an equitable lien on land by an agreement in terms pledging or giving a lien on the land,<sup>14</sup> and may, by a mere indorsement on a note to the effect that it is a charge on land, make it such in legal effect.<sup>15</sup> So, a power of attorney authorizing one to collect the rents of land belonging to the donor of the power, and to apply them on a debt, or for other specific purposes, has been regarded as creating an equitable lien on the land;<sup>16</sup> as has an agreement that a cer-

198; *Stevens v. Flower*, 46 N. J. Eq. 340; *Reid v. Corrigan*, 143 Ill. 402; *Hutchinson v. Gilbert*, 86 Tenn. 464; *Hill v. Bean*, 86 Me. 200; *Peebles v. Acker*, 70 Miss. 356; *Bennett's Estate*, 148 Pa. St. 139. See *Lee v. Lee*, 88 Va. 805; *Hoyt v. Hoyt*, 85 N. Y. 142. In one or two states, however, such a disposition of testator's property is regarded as insufficient to show an intention to charge the land when unaccompanied by other evidence of such an intention. *Pearson v. Wartman*, 80 Md. 528; *Brill v. Wright*, 112 N. Y. 129; *Morris v. Sickly*, 133 N. Y. 456.

<sup>13</sup> 3 *Pomeroy*, Eq. Jur. § 1237; *Walker v. Brown*, 165 U. S. 654; *Ketchum v. St. Louis*, 101 U. S. 306; *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431; *Bell v. Pelt*, 51 Ark. 433, 14 Am. St. Rep. 57; *Love v. Sierra Nevada Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Cotterell v. Long*, 20 Ohio, 464; *Pinch v. Anthony*, 8 Allen (Mass.) 536; *Cummings v. Jackson*, 55 N. J. Eq. 805; *Wayt v. Carwithen*, 21 W. Va. 516. See *Perry v. Board of Missions of Protestant Episcopal Church*, 102 N. Y. 99, *Kirchwey's Cas.* 135.

<sup>14</sup> *Chase v. Peck*, 21 N. Y. 581.

<sup>15</sup> *Peckham v. Haddock*, 36 Ill. 38.

<sup>16</sup> *Joseph Smith Co. v. McGuinness*, 14 R. I. 59; *Spooner v. Sandilands*, 1 *Younge & C.* 390; *Cradock v. Scottish Provident Institution*, (1282)

tain debt shall be paid out of the price to be paid for certain land.<sup>17</sup>

An assignment, for purposes of security, by a vendee of land, of his contract rights in the land, is regarded as creating a lien on the land, or, rather, on his equitable interest in the land.<sup>18</sup> Likewise, when one who furnishes the money for the purchase of land by another, by agreement with the latter, takes the title from the vendor, to hold until his advance is repaid, he has an equitable lien to secure such repayment.<sup>19</sup>

An agreement to give a mortgage on land is also regarded in equity as creating a lien on the land, on the principle that equity regards that as done which ought to be done.<sup>20</sup>

An important application of the principle that equity will carry out the intention to give a security is seen in the case

63 Law J. Ch. 15; *Abbott v. Stratten*, 3 Jones & L. 603. A power to sell land and apply the proceeds on a debt has also been regarded as creating such a lien. *American Loan & Trust Co. v. Billings*, 58 Minn. 187.

<sup>17</sup> *Johnson v. Johnson*, 40 Md. 189; *Pinch v. Anthony*, 8 Allen (Mass.) 536.

<sup>18</sup> *Hays v. Hall*, 4 Port. (Ala.) 374, 30 Am. Dec. 530; *Gamble v. Ross*, 88 Mich. 315; *Russell's Appeal*, 15 Pa. St. 319; *Hackett v. Watts*, 138 Mo. 502.

<sup>19</sup> *Union Mut. Life Ins. Co. v. Slee*, 123 Ill. 57; *Dryden v. Hanway*, 31 Md. 254; *Barnett v. Nelson*, 46 Iowa, 495.

<sup>20</sup> *Bridgeport Electric & Ice Co. v. Meader* (C. C. A.) 72 Fed. 115; *Sprague v. Cochran*, 144 N. Y. 104; *In re Petition of Howe*, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; *Remington v. Higgins*, 54 Cal. 620; *Carter v. Holman*, 60 Mo. 498.

The term "equitable mortgage" might well be restricted to these cases of equitable liens arising from a contract to make a legal mortgage, since in such a case there is a right to have the contract specifically performed by the execution of a legal mortgage, in which respect this class of equitable liens differs from the other classes described in this chapter. *Marshall v. Shrewsbury*, 10 Ch. App. 250, 254; *Matthews v. Goodday*, 31 Law J. Ch. 282. In this country, however, where a legal mortgage is foreclosed usually by sale, and not by a decree of strict foreclosure, there would be no great advantage in exchanging such an equitable lien for a legal mortgage.

of an instrument intended as a valid and legal mortgage, which, though insufficient as such, owing to some defect of form or execution, will, in equity, be regarded as creating a lien or "equitable mortgage."<sup>21</sup> Such a case arises when the mortgage is without the proper seal,<sup>22</sup> or is not witnessed as required by the statute.<sup>23</sup>

In order that an equitable lien be thus created on land by agreement, it is necessary that the land itself be specified in the instrument creating the lien,<sup>24</sup> and that the intention clearly appear that the land is to be security for the performance of the obligation.<sup>25</sup>

#### — By deposit of title deeds.

In England it is a well-established doctrine that, if the title deeds to land are deposited by a debtor with his creditor, such deposit is evidence of an agreement to create a charge on the land, which equity will enforce.<sup>26</sup> The deposit of the deeds does not itself create a charge, but is merely evidence, with

<sup>21</sup> *Burgh v. Francis*, Finch, 28, *Kirchwey's Cas.* 24; *Love v. Sierra Nevada Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Peers v. McLaughlin*, 88 Cal. 294, 22 Am. St. Rep. 306; *Price v. McDonald*, 1 Md. 414, 54 Am. Dec. 657; *McQuie v. Peay*, 58 Mo. 58; *Gale v. Morris*, 30 N. J. Eq. 285; *Sprague v. Cochran*, 144 N. Y. 104; *Bank of Muskingum v. Carpenter's Adm'rs*, 7 Ohio, 21, 28 Am. Dec. 616; *De-la-ire v. Keenan*, 3 Desaus. (S. C.) 74, 4 Am. Dec. 604.

<sup>22</sup> *Sanders v. McDonald*, 63 Md. 503; *Bullock v. Whipp*, 15 R. I. 195; *McClurg v. Phillips*, 49 Mo. 315.

<sup>23</sup> *Moore v. Thomas*, 1 Or. 201.

<sup>24</sup> *Mornington v. Keane*, 2 De Gex & J. 292; *Borden v. Croak*, 131 Ill. 68, 19 Am. St. Rep. 23; *Adams v. Johnson*, 41 Miss. 258; *Lee v. Cole*, 17 Or. 559.

<sup>25</sup> *Mornington v. Keane*, 2 De Gex & J. 292; *Bowen v. McCarthy*, 127 Ill. 17; *Falmouth Nat. Bank v. Cape Cod Ship Canal Co.*, 166 Mass. 550; *Hossack v. Graham*, 20 Wash. 184; *Knott v. Shepherdstown Mfg. Co.*, 30 W. Va. 790.

<sup>26</sup> *Story*, Eq. Jur. § 1020; *Russel v. Russel*, 1 Brown Ch. 269, 1 *White & T. Lead. Cas. Eq.* 931, *Kirchwey's Cas.* 110.



other circumstances, of an intention to create one,<sup>27</sup> and is regarded as a part performance taking the agreement out of the Statute of Frauds.<sup>28</sup>

A lien of this character has been recognized in a number of judicial opinions in this country, usually, however, in cases not directly involving the validity of such a lien.<sup>29</sup> In others, such a deposit is not regarded as creating a lien, on the ground that the contrary view is inconsistent with the system of conveyancing and registration in force in this country, and also involves a violation of the Statute of Frauds.<sup>30</sup>

It would seem that, as between the original parties, and as against purchasers with notice, the only possible objection to an agreement for a lien evidenced by such a deposit of title deeds lies in the fact that it is not evidenced by a writing complying with the Statute of Frauds. If an agreement for a lien is so evidenced, the fact that there is a simultaneous deposit of title deeds does not affect the validity of the agreement as creating a lien; and the English cases merely take the further step of regarding the deposit as sufficient part performance to take the agreement out of the statute.

<sup>27</sup> *Norris v. Wilkinson*, 12 Ves. 192; *Chapman v. Chapman*, 13 Beav. 308; *Ashburner*, Mortgages, 26. Consequently, a deposit merely to enable the lender to prepare a regular mortgage is not sufficient to create a lien. *Norris v. Wilkinson*, 12 Ves. 192; *Lloyd v. Attwood*, 3 De Gex & J. 614, 651; *Hutzler v. Phillips*, 26 S. C. 136, 4 Am. St. Rep. 687.

<sup>28</sup> *Russel v. Russel*, 1 Brown Ch. 269, *Kirchwey's Cas.* 110.

<sup>29</sup> *Richards v. Leaming*, 27 Ill. 431; *Hall v. McDuff*, 24 Me. 311; *Gale's Ex'rs v. Morris*, 29 N. J. Eq. 224; *Rockwell v. Hobby*, 2 Sandf. Ch. (N. Y.) 9; *Chase v. Peck*, 21 N. Y. 584, *Kirchwey's Cas.* 124; *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43, 51; *Hackett v. Reynolds*, 4 R. I. 512; *Hutzler v. Phillips*, 26 S. C. 137, 4 Am. St. Rep. 687; *Jarvis v. Dutcher*, 16 Wis. 307.

<sup>30</sup> *Lehman v. Collins*, 69 Ala. 127; *Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 437; *Gardner v. McClure*, 6 Minn. 250 (Gil. 167); *Hackett v. Watts*, 138 Mo. 502; *Bloomfield State Bank v. Miller*, 55 Neb. 243; *Shitz v. Diffenbach*, 3 Pa. St. 233; *Meador v. Meador*, 3 Heisk. (Tenn.) 562.



**§ 562. Lien for improvements.**

As before stated, one who makes improvements on land in the mistaken belief that he is the owner thereof is given, by equity, a right to compensation for such improvements as against the true owner coming into equity to assert his rights,<sup>31</sup> and this right to compensation is regarded as constituting a lien on the land.<sup>32</sup>

An owner of an undivided interest in land who is entitled to contribution from his cotenants on account of repairs or improvements made by him has a lien on their interests to secure such contribution.<sup>33</sup> Likewise, a life tenant under a will who completes improvements begun by his testator is entitled to compensation therefor, and a lien to secure such compensation.<sup>34</sup>

According to a few decisions, a tenant under a lease providing that he shall be compensated, at the end of the term, for any improvements made by him, has a lien on the land for the value of such improvements.<sup>35</sup> Usually, however, his right to a lien is denied.<sup>36</sup>

<sup>31</sup> See ante, § 241.

<sup>32</sup> *Hannibal & St. J. R. Co. v. Shortridge*, 86 Mo. 662; *Hatcher v. Briggs*, 6 Or. 31; *Field v. Moody*, 111 N. C. 353; *Preston v. Brown*, 35 Ohio St. 18; 2 Story, Eq. Jur. § 1237; 3 Pomeroy, Eq. Jur. § 1241.

<sup>33</sup> *Baird v. Jackson*, 98 Ill. 78; *Prentice v. Janssen*, 79 N. Y. 478; *Alexander v. Ellison*, 79 Ky. 148; *Kelly v. Kelly*, 54 Mich. 30; 3 Pomeroy, Eq. Jur. § 1240. See *Houston v. McCluney*, 8 W. Va. 135.

<sup>34</sup> *Hibbert v. Cooke*, 1 Sim. & S. 552; *Sohier v. Eldredge*, 103 Mass. 345, 351; *Broyles v. Waddel*, 11 Heisk. (Tenn.) 32; *Gavin v. Carl- ing*, 55 Md. 530; 2 Story, Eq. Jur. § 1237.

<sup>35</sup> *Berry v. Van Winkle's Ex'rs*, 2 N. J. Eq. 269; *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247; *Ecke v. Fetzer*, 65 Wis. 55.

<sup>36</sup> *Gardner v. Samuels*, 116 Cal. 84, 58 Am. St. Rep. 135; *Beck v. Birdsall*, 19 Kan. 550; *Watson v. Gardner*, 119 Ill. 312; *Coffin v. Talman*, 8 N. Y. 465; *Hite v. Parks*, 2 Tenn. Ch. 373. See *Speers v. Flack*, 34 Mo. 101, 84 Am. Dec. 74.

**§ 563. Lien for owelty of partition.**

When, by a decree for the partition of land, one of the parties is directed to pay to another a certain sum for "owelty of partition,"<sup>37</sup> the property received by him on the partition is subject to a lien for such sum until paid.<sup>38</sup>

**§ 564. Implied lien of grantor (vendor's lien).**

Upon the conveyance of land, a lien on the land is, in England and a number of the states of this country, raised by implication of law in favor of the vendor for the purchase price, so far as this remains unpaid.<sup>39</sup> In other jurisdictions, however, the existence of the lien is denied.<sup>40</sup> In the United

<sup>37</sup> See ante, § 175.

<sup>38</sup> Freeman, Cotenancy, § 507; Davis v. Norris, 8 Pa. St. 125; McCandless' Appeal, 98 Pa. St. 489; Baltimore & O. R. Co. v. Trimble, 51 Md. 99; Dobbin v. Rex, 106 N. C. 444; Jameson v. Rixey, 94 Va. 342, 64 Am. St. Rep. 726.

<sup>39</sup> Mackreth v. Symmons, 15 Ves. 329, 1 White & T. Lead. Cas. Eq. 447; Crampton v. Prince, 83 Ala. 246, 3 Am. St. Rep. 718; Shall v. Biscoe, 18 Ark. 142; Salmon v. Hoffman, 2 Cal. 138, 56 Am. Dec. 322; Avery v. Clark, 87 Cal. 619, 22 Am. St. Rep. 272; Trustees of Schools v. Wright, 11 Ill. 603; Fouch v. Wilson, 60 Ind. 64, 28 Am. Rep. 651; Kendrick v. Eggleston, 56 Iowa, 128, 41 Am. Rep. 90; Magruder v. Peter, 11 Gill & J. (Md.) 217; Carr v. Hobbs, 11 Md. 285; Peters v. Tunell, 43 Minn. 473, 19 Am. St. Rep. 252; Marsh v. Turner, 4 Mo. 253; Corlies v. Howland, 26 N. J. Eq. 311; Seymour v. McKinstry, 106 N. Y. 230; Anketel v. Converse, 17 Ohio St. 11, 91 Am. Dec. 115; Gee v. McMillan, 14 Or. 268, 58 Am. Rep. 315; Kent v. Gerhard, 12 R. I. 92, 34 Am. Rep. 612; Marshall v. Christmas, 3 Humph. (Tenn.) 616, 39 Am. Dec. 199; Howe v. Harding, 76 Tex. 17, 18 Am. St. Rep. 17; Madden v. Barnes, 45 Wis. 135, 30 Am. Rep. 703.

<sup>40</sup> Simpson v. Mundee, 3 Kan. 172; Atwood v. Vincent, 17 Conn. 575; Philbrook v. Delano, 29 Me. 410; Ahrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449; Kirchwey's Cas. 131; Ansley v. Pasahro, 22 Neb. 662; Womble v. Battle, 38 N. C. 182; Kauffelt v. Bower, 7 Serg. & R. (Pa.) 64, 10 Am. Dec. 428; Hiester v. Green, 48 Pa. St. 96, 86 Am. Dec. 569; Wragg's Representatives v. Comptroller-General, 2 Desaus. (S. C.) 520. See Arlin v. Brown, 44 N. H. 102.

In Georgia, Vermont, and West Virginia it has been abolished by statute. 1 Stimson's Am. St. Law, § 1950.

States courts the lien is regarded as existing in a particular state only when it is recognized by the laws or courts of such state.<sup>41</sup> Even in those states where the lien is recognized, it is not favored by the courts, it being regarded as inconsistent with the policy of the registration laws, which is adverse to secret equities, and the vendor being in a position, by a mortgage or express reservation of a lien, to protect his interests otherwise.<sup>42</sup>

The lien does not exist unless the amount to be secured thereby is capable of exact ascertainment, and consequently it will not arise in the case of an unliquidated claim,<sup>43</sup> as when the consideration for the conveyance is the vendee's

<sup>41</sup> *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46; *Chilton v. Braiden's Adm'r*, 2 Black (U. S.) 458; *Cordova v. Hood*, 17 Wall. (U. S.) 1; *Rice v. Rice* (C. C.) 36 Fed. 860.

<sup>42</sup> Various explanations of the origin and basis of the doctrine of the lien are given. Thus, it is said to rest on "natural equity" (4 Kent's Comm. 152); an implied trust in favor of the vendor (*Mackreth v. Symmons*, 15 Ves. 329; 2 Story, Eq. Jur. § 1217; *Blackburn v. Gregson*, 1 Brown Ch. 420. Contra, 3 Pomeroy, Eq. Jur. § 1250, note; *Ahrend v. Odiorne*, 118 Mass. 264, 19 Am. Rep. 449, *Kirchwey's Cas.* 131); and the desire of chancery, in the time when land could not be subjected to a debt, to evolve some device by which land could be made liable in the hands of the purchaser for the unpaid price (notes to *Mackreth v. Symmons*, 1 White & T. Lead. Cas. Eq. 500; *Gray, C. J.*, in *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449, *Kirchwey's Cas.* 131. Contra, 3 Pomeroy, Eq. Jur. § 1250). Mr. Pomeroy considers that it is merely the application of a general judicial conception that the thing sold constitutes, to some extent at least, a fund for the payment of the price, a conception which was not applied to chattels because they were of less importance than land, and, furthermore, were articles of commerce, the transfer of which it was undesirable in any way to hamper. See 3 Pomeroy, Eq. Jur. § 1250.

<sup>43</sup> *Harris v. Hanie*, 37 Ark. 348; *Peters v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252; *Payne v. Avery*, 21 Mich. 524; *Hiscock v. Norton*, 42 Mich. 320; *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh (Va.) 522; *Chapman v. Beardsley*, 31 Conn. 115.

agreement to support the vendor during his life,<sup>44</sup> nor when there is a sale of land and personalty together, and it does not appear what part of the consideration is to be paid for each.<sup>45</sup> Nor is the lien available for the enforcement of collateral agreements by the vendee, as to assume incumbrances, or to erect buildings.<sup>46</sup>

— Persons affected by the lien.

The lien binds the land in the hands of the heirs and devisees of the vendee,<sup>47</sup> and is effective as against all persons other than purchasers for value,<sup>48</sup> including the widow of the vendee claiming dower in the land.<sup>49</sup> Purchasers of the land for value also take it subject to the lien if they have notice, actual or constructive, of its existence, and not otherwise.<sup>50</sup> Knowledge on the part of a purchaser from the vendee that the purchase price is still unpaid, in whole or in

<sup>44</sup> *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh (Va.) 522. Compare *Chase v. Peck*, 21 N. Y. 581.

<sup>45</sup> *Stringfellow v. Ivie*, 73 Ala. 209; *McCandlish v. Keen*, 13 Grat. (Va.) 615, 629; *Peters v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252.

<sup>46</sup> *McDonald v. Elyton Land Co.*, 78 Ala. 382; *Patterson v. Edwards*, 29 Miss. 67; *Clarke v. Royle*, 3 Sim. 499.

<sup>47</sup> *Edmonson v. Phillips*, 73 Mo. 57; *Pintard v. Goodloe*, Hempst. 502, Fed. Cas. No. 11,171; *Solomon v. Skinner*, 82 Tex. 345.

<sup>48</sup> *Pylant v. Reeves*, 53 Ala. 132, 25 Am. Rep. 605; *Higgins v. Kendall*, 73 Ind. 522; *Acton v. Waddington*, 46 N. J. Eq. 16; *Beal v. Harrington*, 116 Ill. 113; *Christopher v. Christopher*, 64 Md. 583; *Thomas v. Bridges*, 73 Mo. 530.

<sup>49</sup> *Thorn v. Ingram*, 25 Ark. 52; *Noyes v. Kramer*, 54 Iowa, 22; *McClure v. Harris*, 12 B. Mon. (Ky.) 261; *Miller v. Stump*, 3 Gill (Md.) 304; *Warner v. Van Alstyne*, 3 Paige (N. Y.) 513; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Martin v. Smith*, 25 W. Va. 579.

<sup>50</sup> 4 Kent's Comm. 153; *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46; *Craft v. Russell*, 67 Ala. 9; *Koch v. Roth*, 150 Ill. 212; *Hawes v. Chaille*, 129 Ind. 435; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Dance v. Dance*, 56 Md. 433; *Seymour v. McKinstry*, 106 N. Y. 230; *Lewis v. Henderson*, 22 Or. 548; *Poe v. Paxton's Heirs*, 26 W. Va. 607.

part, is sufficient to charge him with notice of the lien;<sup>51</sup> as when there is a recital in the original conveyance to the vendee that the purchase price is unpaid.<sup>52</sup>

—— Transfer of the lien.

In some jurisdictions the lien may be assigned by the vendor along with the claim for purchase money,<sup>53</sup> and an assignment of the claim for purchase money is regarded as transferring the lien, as merely accessory thereto.<sup>54</sup> And in such states the principle of subrogation or "equitable assignment" may be applied, as in the case of mortgages, in favor of one who is forced to pay off the lien to protect himself, he being thereupon substituted in the place of the vendor as regards the lien rights.<sup>55</sup> In a majority of the states, however, in which the lien is recognized, it is regarded as personal to the vendor, and not capable of transfer.<sup>56</sup>

On the death of the person entitled to enforce the lien, the

<sup>51</sup> *Swan v. Benson*, 31 Ark. 728; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57; *Manly v. Slason*, 21 Vt. 271, 52 Am. Dec. 60.

<sup>52</sup> *Cordova v. Hood*, 17 Wall. (U. S.) 1; *Melross v. Scott*, 18 Ind. 250; *Kilpatrick v. Kilpatrick*, 23 Miss. 124, 55 Am. Dec. 79; *McAlpine v. Burnett*, 23 Tex. 649.

<sup>53</sup> *Lagow v. Badollet*, 1 Blackf. (Ind.) 416, 12 Am. Dec. 258; *Plowman v. Riddle*, 14 Ala. 169, 48 Am. Dec. 92; *Johnston v. Gwathmey*, 4 Litt. (Ky.) 317, 14 Am. Dec. 135; *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493.

<sup>54</sup> *Griffin v. Camack*, 36 Ala. 695, 76 Am. Dec. 344; *Kern v. Hazlerigg*, 11 Ind. 443, 71 Am. Dec. 360; *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493; *White v. Downs*, 40 Tex. 225.

<sup>55</sup> *Thomas v. Bridges*, 73 Mo. 530; *Otis v. Gregory*, 111 Ind. 504; *Rodman v. Saunders*, 44 Ark. 504; *Oury v. Saunders*, 77 Tex. 278; *Carey v. Boyle*, 53 Wis. 574.

<sup>56</sup> *Hecht v. Spears*, 27 Ark. 229, 11 Am. Rep. 784; *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *First Nat. Bank of Salem v. Salem Central Flour-Mills Co.* (C. C.) 39 Fed. 89; *Wellborn v. Williams*, 9 Ga. 86, 52 Am. Dec. 427; *Richards v. Leaming*, 27 Ill. 431, 81 Am. Dec. 239; *Hammons v. Peyton*, 34 Minn. 529; *White v. Williams*, 1 Paige (N. Y.) 502.



right passes, with the claim for the purchase price, to his personal representatives.<sup>57</sup>

— Waiver.

The vendor's lien may be waived, either expressly or by implication.<sup>58</sup> What constitutes a waiver by implication has been much discussed, and it is generally agreed that a waiver is not shown by the fact that the vendor takes the personal obligation of the vendee, such as his bond or note, for the unpaid purchase price; this being considered as merely intended to countervail the acknowledgment in the deed of the payment of the purchase money, or to show the time and manner in which the payment is to be made.<sup>59</sup> But the taking of the personal obligation of a person other than the vendee, by way of indorsement, guaranty, or otherwise, is usually regarded as a waiver;<sup>60</sup> and the same effect is given to the taking of security, such as a mortgage, on the land itself or on other property.<sup>61</sup> Taking independent security, however, merely

<sup>57</sup> 2 Story, Eq. Jur. § 1227; Robinson v. Appleton, 124 Ill. 276; Evans v. Enloe, 70 Wis. 345. See Leeper v. Lyon, 68 Mo. 216.

<sup>58</sup> 4 Kent's Comm. 152; Bayley v. Greenleaf, 7 Wheat. (U. S.) 46; Wilson v. Lyon, 51 Ill. 166; Schnebly v. Ragan, 7 Gill & J. (Md.) 125, 28 Am. Dec. 195.

<sup>59</sup> 4 Kent's Comm. 153; Winter v. Anson, 3 Russ. 488; Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Fish v. Howland, 1 Paige (N. Y.) 20; Honore's Ex'r v. Blakewell, 6 B. Mon. (Ky.) 67, 43 Am. Dec. 147; Madden v. Barnes, 45 Wis. 135, 30 Am. Rep. 703; Manly v. Slason, 21 Vt. 271, 52 Am. Dec. 60.

<sup>60</sup> 4 Kent's Comm. 153; Cordova v. Hood, 17 Wall. (U. S.) 1; Andrus v. Coleman, 82 Ill. 26, 25 Am. Rep. 289; Kendrick v. Eggleston, 56 Iowa, 128, 41 Am. Rep. 90; Carrico v. Farmers' & Merchants' Nat. Bank of Baltimore, 33 Md. 235; Fonda v. Jones, 42 Miss. 792, 2 Am. Rep. 669; Durette v. Briggs, 47 Mo. 356; Follett v. Reese, 20 Ohio, 546, 55 Am. Dec. 472; Marshall v. Christmas, 3 Humph. (Tenn.) 616, 39 Am. Dec. 199.

<sup>61</sup> 4 Kent's Comm. 153; Kinney v. Ensminger, 94 Ala. 536; Avery v. Clark, 87 Cal. 619, 22 Am. St. Rep. 272; Baker v. Updike, 155 Ill. 54; Young v. Wood, 11 B. Mon. (Ky.) 123; Fonda v. Jones, 42 Miss.

raises a presumption of waiver, which may be rebutted by evidence of an agreement or intention that the lien shall still exist.<sup>62</sup> A receipt or acknowledgment of payment of the price does not involve a waiver of the lien if the price has not actually all been paid.<sup>63</sup>

**§ 565. Express lien of grantor.**

In all jurisdictions, including those in which there is no vendor's lien by implication of law, it is recognized that the vendor may, by express provision in the deed of conveyance, or in a separate instrument, reserve a lien for a part or the whole of the purchase price.<sup>64</sup> Such a lien is recognized by the courts as closely approximating to a mortgage in its character and effect,<sup>65</sup> it being, as has been well said, a "mode of realizing the purely equitable conception of a mortgage,

792, 2 Am. Rep. 669; *Orrick v. Durham*, 79 Mo. 174. But that the lien is not waived by taking a mortgage on the land, see *Boos v. Ewing*, 17 Ohio, 521, 49 Am. Dec. 478; *Wasson v. Davis*, 34 Tex. 159.

<sup>62</sup> *Cordova v. Hood*, 17 Wall. (U. S.) 1; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57; *Stroud v. Allison*, 35 Ark. 100; *McGonigal v. Plummer*, 30 Md. 422; *Fonda v. Jones*, 42 Miss. 792, 2 Am. Rep. 669; *Sanders v. McAfee*, 41 Ga. 684; *Lord v. Wilcox*, 99 Ind. 491; *Hunt v. Marsh*, 80 Mo. 396; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272; *Marshall v. Christmas*, 3 Humph. (Tenn.) 616, 39 Am. Dec. 199; *Kendrick v. Eggleston*, 56 Iowa, 128, 41 Am. Rep. 90; *Boies v. Benham*, 127 N. Y. 620.

<sup>63</sup> *Mackreth v. Symmons*, 15 Ves. 329; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Holman v. Patterson's Heirs*, 29 Ark. 357; *Thompson v. Corrie*, 57 Md. 197; *Simpson v. McAllister*, 56 Ala. 228; *Kent v. Gerhard*, 12 R. I. 92, 34 Am. Rep. 612.

<sup>64</sup> 3 *Pomeroy*, Eq. Jur. § 1257; *Bell v. Pelt*, 51 Ark. 433, 14 Am. St. Rep. 57; *Greeno v. Barnard*, 18 Kan. 518; *Morrison v. Brown*, 83 Ill. 562; *Carr v. Thompson*, 67 Mo. 472; *Jackson v. Rutledge*, 3 Lea (Tenn.) 626, 31 Am. Rep. 655; *Helm v. Weaver*, 69 Tex. 143. See *Hiester v. Green*, 48 Pa. St. 96, 86 Am. Dec. 569.

<sup>65</sup> *Ober v. Gallagher*, 93 U. S. 199; *King v. Young Men's Ass'n*, 1 Woods, 386, Fed. Cas. No. 7,811; *Markoe v. Andras*, 67 Ill. 34; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Ufford v. Wells*, 52 Tex. 612.

stripped of all its legal forms and features.”<sup>66</sup> The lien binds the land in the hands of all persons except purchasers for value without notice, and one claiming under the vendee is necessarily charged with notice if the lien is expressly reserved in the deed, and this is recorded.<sup>67</sup> No particular language is necessary to give rise to this lien, provided the intention to reserve the lien is clearly expressed;<sup>68</sup> but the mere recital that the purchase money or a part thereof is unpaid is insufficient.<sup>69</sup> This express lien may be assigned, and the benefit thereof will pass to the assignee of the whole or part of the purchase money secured by the lien.<sup>70</sup>

**§ 566. Vendor's lien before conveyance.**

Upon the making of a contract for the sale of land, with a stipulation for the making of a conveyance in the future, as when the vendor gives a bond to convey upon the performance of certain conditions by the purchaser, the vendor becomes, as before explained, a trustee for the purchaser, and holds the legal title subject to the terms of the contract of sale.<sup>71</sup> The equitable interest or estate which the purchaser has in such case is, however, subject to the right of the vendor to payment of the purchase price, and this right the vendor may, if necessary, enforce by a proceeding in equity somewhat analogous to the foreclosure of a mortgage, by which the vendee loses all his contract rights in the land.<sup>72</sup> The courts,

<sup>66</sup> 3 Pomeroy, Eq. Jur. § 1257.

<sup>67</sup> 3 Pomeroy, Eq. Jur. §§ 1257, 1258; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Sidwell v. Wheaton*, 114 Ill. 267; *Stratton v. Gold*, 40 Miss. 778; *Eichelberger v. Gitt*, 104 Pa. St. 64.

<sup>68</sup> *Moore v. Lackey*, 53 Miss. 85; 3 Pomeroy, Eq. Jur. § 1256, note.

<sup>69</sup> *Hiester v. Green*, 48 Pa. St. 96, 86 Am. Dec. 569.

<sup>70</sup> *Ober v. Gallagher*, 93 U. S. 199; *Dowdy v. Blake*, 50 Ark. 205, 7 Am. St. Rep. 88; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Markoe v. Andras*, 67 Ill. 34; *Duncan v. Louisville*, 13 Bush (Ky.) 378; *Bailey v. Smock*, 61 Mo. 213; *Moore v. Lackey*, 53 Miss. 85.

<sup>71</sup> See ante, § 110.

<sup>72</sup> *Micou v. Ashurst*, 55 Ala. 607; *Sparks v. Hess*, 15 Cal. 186, 194;

in referring to this right of the vendor to enforce his claim against the land, frequently assimilate the relation of the vendor and vendee to that of mortgagee and mortgagor;<sup>73</sup> and the right of the vendor to enforce his claim for the price against the vendee's equitable interest in the land itself is frequently spoken of as a "vendor's lien,"—a use of the latter term which is to be carefully distinguished from its use to describe what we have treated of above under the name of "the implied lien of the grantor."<sup>74</sup> Since the retention of the legal title shows a clear intention to rely on such title as security for payment of the price, a waiver of this right of the vendor will not be implied from the taking of other security for the price.<sup>75</sup> This lien, so called, in favor of the vendor, passes to one to whom he transfers the right of action for the purchase money, as by an assignment of a note given therefor.<sup>76</sup>

### § 567. Vendee's lien.

The vendee under a contract for the sale of land has, in equity, before he receives a conveyance of the land, a lien

*Gaston v. White*, 46 Mo. 486; *Moore v. Anders*, 14 Ark. 628, 60 Am. Dec. 551.

<sup>73</sup> *Hardin v. Boyd*, 113 U. S. 756; *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58; *Hutchinson v. Crane*, 100 Ill. 269; *Strickland v. Kirk*, 51 Miss. 795; *Graham v. McCampbell*, Meigs (Tenn.) 56, 33 Am. Dec. 126; *Church v. Smith*, 39 Wis. 492.

<sup>74</sup> The confusion arising from these different uses of the term "vendor's lien," and the essential distinctions between these various equitable rights, are admirably discussed in 3 Pomeroy, Eq. Jur. §§ 1260, 1261.

<sup>75</sup> *Robinson v. Appleton*, 124 Ill. 276; *McCaslin v. State*, 44 Ind. 151; *Hurley v. Hollyday*, 35 Md. 469.

<sup>76</sup> *Burkhart v. Howard*, 14 Or. 39; *Stevens v. Chadwick*, 10 Kan. 406, 15 Am. Rep. 348; *Robinson v. Harbour*, 42 Miss. 795, 97 Am. Dec. 501; *McClintic v. Wise's Adm'rs*, 25 Grat. (Va.) 448, 18 Am. Rep. 694; *McConnell v. Beattie*, 34 Ark. 113; *Hutchinson v. Crane*, 100 Ill. 269.

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thereon for any payments which he has made upon the purchase price in case the contract fails of consummation owing to the fault of the vendor.<sup>77</sup>

<sup>77</sup> *Rose v. Watson*, 10 H. L. Cas. 672; *Stults v. Brown*, 112 Ind. 370, 2 Am. St. Rep. 190; *Cooper v. Merritt*, 30 Ark. 686; *Wickman v. Robinson*, 14 Wis. 493, 80 Am. Dec. 789; *Galbraith v. Reeves*, 82 Tex. 357; 2 Story, Eq. Jur. § 1217; 3 Pomeroy, Eq. Jur. § 1263.

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## CHAPTER XXXVII.

### STATUTORY LIENS.

- § 568. General considerations.
- 569. Mechanics' liens.
- 570. Judgment liens.
- 571. Attachment liens.
- 572. Execution liens.
- 573. Liens for taxes and assessments.
- 574. The lien of decedent's debts.
- 575. Liens on crops.
- 576. The statutory lien for improvements.
- 577. Widow's allowance.

Liens on another's land may exist by force of a statute, either expressly providing for a lien in a certain contingency, or in effect doing so by making the land liable for the enforcement of an obligation, without reference to its transfer to one not originally liable on the obligation. The principal statutory liens on land are (1) mechanics' liens, (2) judgment liens, (3) attachment liens, (4) execution liens, (5) liens for taxes and assessments, (6) the lien of a decedent's debts. Of occasional occurrence are (7) various liens on crops on the land, (8) the statutory lien for improvements, (9) the lien of the widow's allowance, and in some states there are other statutory liens.

#### § 568. General considerations.

Since, at common law, no lien upon land was recognized, the only liens which can at the present day be imposed thereon, apart from equitable liens proper, and mortgages, the lien idea of which is the creation of equity, are those authorized by statute, known as "statutory liens." The legislatures of the various states, in providing for such liens, have followed the (1296)

same general lines of policy, and there are, it is believed, in but few states liens of a character not referred to in the following sections.

§ 569. **Mechanics' liens.**

A mechanic's lien is a lien on land, and on the fixtures and improvements thereon, created by statute, to secure the compensation of persons who, under contract with the owner, or some person authorized in his behalf, contribute labor or materials to the improvement of the land.

— **Persons entitled to lien.**

The statute usually provides that any person furnishing labor or materials for the erection or repair of a building shall have a lien on the land and the building, and it sometimes specifically names certain classes of persons so entitled, such as "mechanics," "laborers," "materialmen," "builders," or the like.<sup>1</sup> A lien of this same general character is also sometimes given for work not in connection with the erection or repair of buildings, as for work upon bridges, canals, railroads, mines, fences, or machinery.<sup>2</sup>

The earlier mechanic's lien statutes sometimes protected only those who furnished labor or materials otherwise than by direct contract with the owner of the land, and did not give a lien to a person contracting directly with the owner.<sup>3</sup> The present statutes, however, always give a lien to a person furnishing labor or materials by direct contract with the owner, who is usually known as the "contractor."<sup>4</sup>

<sup>1</sup> 1 Stimson's Am. St. Law, §§ 1961, 1962.

<sup>2</sup> See, as to the statutes creating liens for work done in and about mines, Barringer & Adams, Mines, 771; for work done upon railroads, 2 Jones, Liens, §§ 1618-1625; Boisot, Mech. Liens, §§ 188-205.

<sup>3</sup> Phillips, Mech. Liens, §§ 41, 42.

<sup>4</sup> Phillips, Mech. Liens, §§ 36, 40; Boisot, Mech. Liens, § 218.

A "subcontractor"—that is, a person furnishing labor, not by contract with the owner, but by contract with the contractor—is in most states entitled to a lien.<sup>5</sup>

In undertaking to give to a subcontractor a lien for his labor, two different theories or systems have been adopted in the statutes of the different states. By one system, sometimes known as the "New York" system, a subcontractor is given a lien by way of "subrogation," as it is expressed, to the rights of the contractor,—that is, he stands in the place of the contractor, and cannot claim a lien for a sum greater than that due to the contractor at such time as the subcontractor may give notice of his claim to the owner, who is thus enabled to withhold from the principal contractor sufficient to satisfy the claim of the subcontractor.<sup>6</sup> Under the other system, sometimes termed the "Pennsylvania" system, the subcontractor is given a direct lien, without reference to the rights of the contractor, and consequently the owner acts at his peril if he makes any payments to the contractor, unless he has first satisfied himself that the subcontractor's claims are paid.<sup>7</sup> So, while under the New York system the subcontractor has no lien if the contractor makes default in his contract, so as to leave nothing owing to the latter,<sup>8</sup> such default does not, under the Pennsylvania system, affect the subcontractor's lien

<sup>5</sup> 1 Stimson's Am. St. Law, § 1966; Phillips, Mech. Liens, §§ 44, 45.

<sup>6</sup> See *Larkin v. McMullin*, 120 N. Y. 206; *Renton v. Conley*, 49 Cal. 185; *McIntire v. Barnes*, 4 Colo. 288; *Culver v. Elwell*, 73 Ill. 536; *Cudworth v. Bostwick*, 69 N. H. 536; *Copeland v. Manton*, 22 Ohio St. 398; *Berry v. McAdams*, 93 Tex. 431.

<sup>7</sup> *Merrigan v. English*, 9 Mont. 113; *White v. Miller*, 18 Pa. St. 52; *Hunter v. Truckee Lodge*, 14 Nev. 24; *Andis v. Davis*, 63 Ind. 17; *Laird v. Moonan*, 32 Minn. 358; *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47; *Bowen v. Phinney*, 162 Mass. 593, 44 Am. St. Rep. 391; *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170.

<sup>8</sup> *Kelly v. Bloomington*, 139 N. Y. 343; *Smith v. Sheltering Arms*, 89 Hun (N. Y.) 70; *Mayer v. Mutchler*, 50 N. J. Law, 162; *Fullenwider v. Longmoor*, 73 Tex. 480.

for the full amount of his claim.<sup>9</sup> But even where the latter system prevails, the subcontractor's right to a lien arises from the original contract between the owner and the contractor, and he cannot claim for work not authorized by such contract, nor demand payment in a mode other than that named therein.<sup>10</sup>

"Materialmen"—that is, persons furnishing, not labor, but materials—have liens only when the statute so provides, and are not usually regarded as within the scope of provisions for the benefit of "contractors," "mechanics," or the like.<sup>11</sup> Materialmen may be those furnishing materials under contract either with the owner, with the contractor, or even with a subcontractor, and the phraseology of the statute may, of course, be such as to give a lien to a materialman of one of such classes, and not to others. The distinct systems of legislation referred to in connection with subcontractors exist also in the case of persons furnishing materials to the contractor, their rights being dependent on the state of accounts between the contractor and the owner in those states in which the New York rule is followed,<sup>12</sup> while their rights are unaffected by this consideration in states where the Pennsylvania rule is adopted.<sup>13</sup>

<sup>9</sup> *Linden Steel Co. v. Rough Run Mfg. Co.*, 158 Pa. St. 238; *Seeman v. Biemann*, 108 Wis. 365; *Bowen v. Phinney*, 162 Mass. 593, 44 Am. St. Rep. 391.

<sup>10</sup> *Boisot*, Mech. Liens, §§ 228-231; *Phillips*, Mech. Liens, §§ 58, 62g; 2 *Jones*, Liens, § 1289; *Schroeder v. Galland*, 134 Pa. St. 277; *Taylor v. Murphy*, 148 Pa. St. 337, 33 Am. St. Rep. 825; *Siebrecht v. Hogan*, 99 Wis. 437.

<sup>11</sup> *Hinckley v. Field's Biscuit & Cracker Co.*, 91 Cal. 136; *Duff v. Hoffman*, 63 Pa. St. 191; *Arnold v. Budlong*, 11 R. I. 561; *Davis v. Betz*, 66 Ala. 206; *Boisot*, Mech. Liens, § 241; *Phillips*, Mech. Liens, § 47.

<sup>12</sup> *Shelton v. Merrill*, 63 Ala. 343; *Carman v. McIncrow*, 13 N. Y. 70; *Turner v. Strenzel*, 70 Cal. 28; *Berry v. McAdams*, 93 Tex. 431.

<sup>13</sup> *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47; *White v. Miller*, 18 Pa. St. 52.

—— Contract or consent of owner.

The statute usually provides that the labor or materials must have been furnished by agreement with, or sometimes by the "consent" of, the "owner."<sup>14</sup> The term "owner" includes not only those who have an estate in fee in the land, but also those having an estate less than freehold. One having such limited estate can, however, as a rule, not create a lien more extensive than his own interest; that is, on others' interests in the land.<sup>15</sup> Labor or materials furnished under a contract with one having a mere leasehold estate in the land may, however, support a lien upon the reversion, if the owner of the latter expressly or impliedly authorizes or adopts such contract,<sup>16</sup> and, where the statute creates a lien for labor or materials furnished with the consent or permission of the owner, the reversion may become subject to a lien for work or labor furnished under a contract with the lessee, by reason of consent, expressed or implied, on the part of the reversioner, to the making of the improvements.<sup>17</sup>

A vendee under an executory contract for the sale of land is sometimes regarded as the "owner," within the meaning of the mechanic's lien acts, he having, as before explained, an equitable interest in the land. On this theory, one furnish-

<sup>14</sup> 1 Stimson's Am. St. Law, § 1966.

<sup>15</sup> See *Paulsen v. Manske*, 126 Ill. 72, 9 Am. St. Rep. 532; *Monroe v. West*, 12 Iowa, 119, 79 Am. Dec. 524; *Currier v. Cummings*, 40 N. J. Eq. 145; *Choteau v. Thompson*, 2 Ohio St. 114; *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486; *Francis v. Sayles*, 101 Mass. 435; *Cornell v. Barney*, 94 N. Y. 394; *Long v. McLanahan*, 103 Pa. St. 537; *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619, 75 Am. St. Rep. 862; *Hoffman v. McColgan*, 81 Md. 390; 2 *Jones, Liens*, §§ 1272-1276; *Phillips, Mech. Liens*, §§ 83-89.

<sup>16</sup> *Scroggin v. National Lumber Co.*, 41 Neb. 195; *Kremer v. Walton*, 11 Wash. 120, 48 Am. St. Rep. 870; *Hall v. Parker*, 94 Pa. St. 109.

<sup>17</sup> *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275; *Gay v. Hervey*, 41 N. J. Law, 39; *Bentley v. Adams*, 92 Wis. 386; *Burkitt v. Harper*, 79 N. Y. 273.



ing labor or materials under contract with such vendee has a lien on his interest in the land, which extends to the legal title when acquired by the latter, and which is, on the other hand, terminated if the vendee loses all rights under his contract by a failure to comply therewith.<sup>18</sup> A lien has been sustained in favor of one furnishing labor or materials under a contract with a vendee, in some cases, on the theory that he was, under the particular circumstances, the agent of the vendor,<sup>19</sup> and, in other cases, on the ground that the improvements on the land were with the vendor's consent, and so within the statutory requirement of the owner's consent, as when it was stipulated in the contract of sale that such improvements were to be made.<sup>20</sup>

#### — Priorities.

A mechanic's lien is valid, in most, if not all, jurisdictions, as against purchasers of the land; the purchaser being affected with notice of the lien either by the fact that improvements are being made on the land, or by the presence upon the court records of proceedings to obtain or enforce the lien.<sup>21</sup> Likewise, a mortgage of the land or other lien thereon, taking effect after the inception of the mechanic's lien, is subject there-

<sup>18</sup> *Monroe v. West*, 12 Iowa, 119, 79 Am. Dec. 524; *Colman v. Goodnow*, 36 Minn. 9, 1 Am. St. Rep. 632; *Fullmer v. Poust*, 155 Pa. St. 275, 35 Am. St. Rep. 881; *Paulsen v. Manske*, 126 Ill. 72; *Kerrick v. Ruggles*, 78 Wis. 274; *Chicago Lumber Co. v. Osborn*, 40 Kan. 168. Contra, to the effect that the vendee is not an "owner," see *Brown v. Morison*, 5 Ark. 217; *Hayes v. Fessenden*, 106 Mass. 228.

<sup>19</sup> *Moore v. Jackson*, 49 Cal. 109; *Henderson v. Connelly*, 123 Ill. 98, 5 Am. St. Rep. 490; *Althen v. Tarbox*, 48 Minn. 18, 31 Am. St. Rep. 616; *Sheehy v. Fulton*, 38 Neb. 691, 41 Am. St. Rep. 767.

<sup>20</sup> *Baker v. Waldron*, 92 Me. 17, 69 Am. St. Rep. 483; *Hackett v. Badeau*, 63 N. Y. 476; *Edwards & McCulloch Lumber Co. v. Mosher*, 88 Wis. 672; *Davis v. Humphrey*, 112 Mass. 309.

<sup>21</sup> See *Work v. Hall*, 79 Ill. 196; *Miller v. Barroll*, 14 Md. 173; *Fleming v. Bumgarner*, 29 Ind. 424; *Blauvelt v. Woodworth*, 31 N. Y. 285; *Burr v. Maultsby*, 99 N. C. 263, 6 Am. St. Rep. 517; *Ambrose v. Woodmansee*, 27 Ohio St. 147; *Williams v. Chicago. S. F. & C. Ry. Co.*, 112 Mo. 463, 34 Am. St. Rep. 403.

to.<sup>22</sup> A mortgage executed and recorded before the attaching of the lien will take precedence thereof,<sup>23</sup> and, in some states, it is sufficient that it be executed, though not recorded.<sup>24</sup> Under the statutes of some states, a mechanic's lien, while subject to a prior mortgage or other incumbrance as regards the land and pre-existing improvements thereon, takes precedence as to improvements for the creation or repair of which the lien is claimed.<sup>25</sup>

The time at which the mechanic's lien attaches to the land is of primary importance in determining priorities as between the lien and the claims of purchasers or other incumbrancers. In some states the lien attaches when the contract under which the labor or materials are furnished was made;<sup>26</sup> in some, when the building or improvement was commenced;<sup>27</sup> in some, when the person asserting the lien first began to furnish the labor or materials for which the lien is claimed;<sup>28</sup> and in

<sup>22</sup> Jones, Liens, §§ 1457-1486; Soule v. Hurlbut, 58 Conn. 511; Thielman v. Carr, 75 Ill. 385; Dunklee v. Crane, 103 Mass. 470; Hahn's Appeal, 39 Pa. St. 409.

<sup>23</sup> National Bank of Athens v. Danforth, 80 Ga. 55; Thielman v. Carr, 75 Ill. 385; Batchelder v. Hutchinson, 161 Mass. 462; Folsom v. Cragen, 11 Colo. 205; Jean v. Wilson, 38 Md. 288; 2 Jones, Liens, § 1460.

<sup>24</sup> Root v. Bryant, 57 Cal. 48; Oliver v. Davy, 34 Minn. 292; Ryder v. Cobb, 68 Iowa, 235.

<sup>25</sup> Preston v. Sonora Lodge, No. 10, 39 Cal. 116; Jarvis v. State Bank of Ft. Morgan, 22 Colo. 309, 55 Am. St. Rep. 129; Bradley v. Simpson, 93 Ill. 93; Ivey v. White, 50 Miss. 142; Russell v. Grant, 122 Mo. 161, 43 Am. St. Rep. 563; 2 Jones, Liens, § 1462; Boisot, Mech. Liens, § 149.

<sup>26</sup> Paddock v. Stout, 121 Ill. 571; Dunklee v. Crane, 103 Mass. 470.

<sup>27</sup> Apperson v. Farrell, 56 Ark. 640; Hahn's Appeal, 39 Pa. St. 409; Neilson v. Iowa Eastern Ry. Co., 44 Iowa, 71; Delaware Railroad Construction Co. v. Davenport & St. P. Ry. Co., 46 Iowa, 406; Kansas Mortgage Co. v. Weyerhaeuser, 48 Kan. 355; Milner v. Norris, 13 Minn. 455 (Gil. 424); Oriental Hotel Co. v. Griffiths, 88 Tex. 574, 53 Am. St. Rep. 790.

<sup>28</sup> Tritch v. Norton, 10 Colo. 337; Kellenberger v. Boyer, 37 Ind. (1302)

others, when a claim or statement of the lien is filed, or notice of the claim is given to the owner.<sup>29</sup>

— **Assertion and enforcement of lien.**

The statutes quite frequently provide that one seeking to enforce a mechanic's lien shall so notify the owner of the land; this requirement existing especially in the case of liens in favor of persons not contracting directly with such owner, such as subcontractors, and persons furnishing materials to contractors.<sup>30</sup>

In most states there is a statutory requirement that the person claiming the lien file, within a certain time, a verified statement of the character of the contract, the work done thereunder, the amount due, the property on which the lien is claimed, and, frequently, other matters concerning the claim. This statement is called by different names, such as "claim," "notice," or "account," and the statutory requirements in regard thereto must be strictly complied with.<sup>31</sup> The effect of filing such a statement is to establish the lien, since it serves as notice to all the world of the existence of the claim. After the lien is thus established, the lienor may begin a proceeding to sell the land under the lien. This proceeding is usually in equity, and is similar, in its general aspects, to an equitable suit for the sale of land under a mortgage.<sup>32</sup>

188; *Chapman v. Brewer*, 43 Neb. 890, 47 Am. St. Rep. 779; *Burr v. Maultsby*, 99 N. C. 263, 6 Am. St. Rep. 517.

<sup>29</sup> *McCorkle v. Herrman*, 117 N. Y. 297; *Ritchey v. Risley*, 3 Or. 184; *Hinckley & Egery Iron Co. v. James*, 51 Vt. 240; *Cahoon v. Levy*, 6 Cal. 295, 65 Am. Dec. 515.

<sup>30</sup> 1 *Stimson's Am. St. Law*, §§ 1965, 1967.

<sup>31</sup> 1 *Stimson's Am. St. Law*, § 1968; *Phillips, Mech. Liens*, § 337 et seq.; *Boisot, Mech. Liens*, § 374 et seq.

<sup>32</sup> 2 *Jones, Liens*, § 1554 et seq.; *Boisot, Mech. Liens*, § 507 et seq.; 13 *Enc. Pl. & Pr.* 939.

—— Release or waiver of lien.

The right to a mechanic's lien may be waived or released.<sup>33</sup> In some states, but in a minority only, a waiver is *prima facie* inferred from the fact that the person furnishing labor or materials has taken collateral security<sup>34</sup> or a mortgage on the specific land<sup>35</sup> for his claim. The mere acceptance of a note, signed by the owner or other person liable for the debt, is not a waiver, in the absence of an intention to that effect.<sup>36</sup>

§ 570. Judgment liens.

At common law, a creditor had no remedy against the lands of his debtor for the satisfaction of his claim; but by 13 Edw. I. c. 18,<sup>37</sup> it was provided that, when a debt is recovered or damages awarded, it shall be thenceforth "in the election" of the creditor to have a writ of *fiery facias* against the goods and chattels of the debtor, or else a writ that the sheriff deliver to him all the chattels of the debtor and the one-half of

<sup>33</sup> Phillips, Mech. Liens, cc. 24, 26; 2 Jones, Liens, §§ 1500-1537; Boisot, Mech. Liens, §§ 705-719, 732.

<sup>34</sup> Clark v. Moore, 64 Ill. 273; Bristol-Goodson Electric Light & Power Co. v. Bristol Gas, Electric Light & Power Co., 99 Tenn. 371. See Grant v. Strong, 18 Wall. (U. S.) 623. By statute in several states the lien is waived by taking collateral security. 2 Jones, Mortgages, § 1519. But that taking collateral security raises no presumption of waiver, see Ford v. Wilson, 85 Ga. 109; Allis v. Meadow Spring Distilling Co., 67 Wis. 16; Hinchman v. Lybrand, 14 Serg. & R. (Pa.) 32; Hoagland v. Lusk, 33 Neb. 376, 29 Am. St. Rep. 485. See McKeen v. Haseltine, 46 Minn. 426.

<sup>35</sup> Trullinger v. Kofoed, 7 Or. 228, 33 Am. Rep. 708; Willison v. Douglas, 66 Md. 99; Weaver v. Demuth, 40 N. J. Law, 238; Grant v. Strong, 18 Wall. (U. S.) 623. Contra, Parberry v. Johnson, 51 Miss. 291; Gilcrest v. Gottschalk, 39 Iowa, 311; Chapman v. Brewer, 43 Neb. 890, 47 Am. St. Rep. 779; Farmers' & Mechanics' Nat. Bank of Fort Worth v. Taylor, 91 Tex. 78.

<sup>36</sup> Montandon v. Deas, 14 Ala. 33, 48 Am. Dec. 84; McKeen v. Hazeltine, 46 Minn. 426; Ehlers v. Elder, 51 Miss. 499.

<sup>37</sup> St. Westminster II. (A. D. 1285).

his land. The writ issued to the sheriff under this statute was called a writ of *elegit*, because it stated that the creditor had elected (*elegit*) to pursue the remedy furnished by the statute. In construing this statute it was decided that the creditor could enforce his remedy against the lands even in the hands of one to whom they had been sold by the debtor after the recovery of the judgment, and this in effect made the judgment a lien or incumbrance on all the lands of the debtor.<sup>38</sup> In one or two states the lien has been regarded as existent by force of this statute, or of a colonial statute giving a right to levy an execution,<sup>39</sup> but it is usually considered that no such lien exists, in the absence of a state statutory provision therefor,<sup>40</sup> and there is, in most of the states, such a provision subjecting the judgment debtor's land, or certain interests therein, to the lien of a judgment.<sup>41</sup>

The lien of a judgment is not, it seems, to be regarded as a proprietary right in the lands subject thereto, but merely as a right to levy on any of such lands for the purpose of satisfying the judgment, to the exclusion or destruction of any rights which may have accrued to others since the attachment of the lien.<sup>42</sup> Consequently, the lienor has no right

<sup>38</sup> See Williams, Real Prop. (18th Ed.) 251; *Massingill v. Downs*, 7 How. (U. S.) 760; *Morsell v. First Nat. Bank of Washington*, 91 U. S. 357.

<sup>39</sup> *United States v. Morrison*, 4 Pet. (U. S.) 124; *Coombs v. Jordan*, 3 Bland Ch. (Md.) 284, 22 Am. Dec. 236; *Borst v. Nalle*, 28 Grat. (Va.) 423; *Hutcheson v. Grubbs*, 80 Va. 254.

<sup>40</sup> *Woods v. Mains*, 1 G. Greene (Iowa) 275; *Thompson v. Avery*, 11 Utah, 214; *Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818. See *Groves' Appeal*, 68 Pa. St. 143.

<sup>41</sup> In the New England states, the judgment creditor has no lien, but he may secure payment of such judgment as may be rendered by the previous issuance of an attachment. See post, § 571.

<sup>42</sup> See *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, *Kirchwey's Cas.* 36; *Conard v. Atlantic Ins. Co. of New York*, 1 Pet. (U. S.) 386, 442; *Ashton v. Slater*, 19 Minn. 347 (Gil. 300); *Foute v. Fairman*, 48 Miss. 536; *Mansfield v. Gregory*, 11 Neb. 297; *Bruce v. Nicholson*, 109 N. C. 202, 26 Am. St. Rep. 562.



in the land subject to the lien which authorizes him to complain of waste thereon by the judgment debtor,<sup>43</sup> and he could not, it would seem, maintain an action of tort against third persons for injury thereto.

—— Character of the judgment.

In order that a judgment may constitute a lien, it must be one on which execution could immediately issue,<sup>44</sup> and consequently it must be a final, and not an interlocutory, judgment,<sup>45</sup> and must be for a definite sum of money.<sup>46</sup> Subject to these requirements, the fact that the judgment is by confession<sup>47</sup> or by default<sup>48</sup> is immaterial.

The judgment of a justice of the peace or of any other inferior court usually, by the express provision of the statute, becomes a lien only after the filing of a transcript or record thereof in one of the superior courts.<sup>49</sup>

The judgment of a federal court is, by act of congress, made a lien on property throughout the state in which it is

<sup>43</sup> *Lanning v. Carpenter*, 48 N. Y. 408, 412; *Independent School Dist. of West Point v. Werner*, 43 Iowa, 643. But see *Witmer's Appeal*, 45 Pa. St. 455, 84 Am. Dec. 505, where an injunction against the removal of fixtures was issued on the petition of the judgment creditor.

<sup>44</sup> 2 *Freeman, Judgments*, § 340; *Davidson v. Myers*, 24 Md. 538; *In re Boyd*, 4 Sawy. 262, Fed. Cas. No. 1,746; *Towner v. Wells*, 8 Ohio, 136.

<sup>45</sup> *Grant v. Bennett*, 96 Ill. 513; *Eastham v. Sallis*, 60 Tex. 576; *Davidson v. Myers*, 24 Md. 538; 2 *Freeman, Judgments*, § 341.

<sup>46</sup> *Noe v. Moutray*, 170 Ill. 177; *Eastham v. Sallis*, 60 Tex. 576; *Linn v. Patton*, 10 W. Va. 187.

<sup>47</sup> *Gilman v. Hovey*, 26 Mo. 280; *White v. Bogart*, 73 N. Y. 256; *Lauffer v. Cavett*, 87 Pa. St. 479.

<sup>48</sup> *Sellers v. Burk*, 47 Pa. St. 344.

<sup>49</sup> See *Petrav v. Howell*, 20 Ark. 615; *Laughlin v. Hawley*, 9 Colo. 170; *American Ins. Co. v. Gibson*, 104 Ind. 336; *Easterling v. Chiles*, 93 Ky. 315; *Jackson v. Jones*, 9 Cow. (N. Y.) 182; *Adams v. Guy*, 106 N. C. 275; *White v. Espey*, 21 Or. 328.

rendered to the same extent, and subject to the same conditions, as in the case of a judgment rendered by a state court.<sup>50</sup>

In a number of the states there is a statutory provision making a decree in equity for the payment of money a lien on land to the same extent as a judgment at law, either by an express provision to that effect, or by a general declaration that such a decree shall have the same force and effect as a legal judgment.<sup>51</sup>

The judgment must, by the law of most of the states, be docketed or recorded, in order to constitute a lien, and there is usually a further requirement that it be indexed. The statutory requirements in these respects must be strictly followed, and a failure to comply therewith will usually render the judgment nugatory as against a subsequent *bona fide* purchaser of the land.<sup>52</sup> Such provisions are, however, usually regarded as intended merely to protect persons without notice of the judgment, so that the failure to comply therewith will not affect the lien as against subsequent purchasers or lienors with notice of the judgment.<sup>53</sup>

<sup>50</sup> Act Aug. 1, 1888 (25 Stat. 357). See *Cooke v. Avery*, 147 U. S. 375.

<sup>51</sup> *Eames v. Germania Turn Verein*, 74 Ill. 54; *Hohman's Appeal*, 127 Pa. St. 209; *Battle v. Bering*, 7 Yerg. (Tenn.) 529, 27 Am. Dec. 526; *Conard v. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679; *Myers v. Hewitt*, 16 Ohio, 449; *Linn v. Patton*, 10 W. Va. 187. In *Blake v. Heyward*, 1 Bailey, Eq. (S. C.) 208, it was held that the same result followed from a statute authorizing an execution to issue under an equity decree.

<sup>52</sup> As to docketing, see *Roll v. Rea*, 57 N. J. Law, 647; *Reid v. McGowan*, 28 S. C. 74; *Flanagan v. Oberthier*, 50 Tex. 379; *Duncan v. Custard*, 24 W. Va. 730; *Josselyn v. Stone*, 28 Miss. 753; *Wood v. Reynolds*, 7 Watts & S. (Pa.) 406; *Berry v. Reed*, 73 Ind. 235; *Bush v. Faris*, 30 U. S. App. 626, 71 Fed. 770, 18 C. C. A. 315. As to indexing, see *Metz v. State Bank of Brownville*, 7 Neb. 165; *Aetna Life Ins. Co. v. Hesser*, 77 Iowa, 381, 14 Am. St. Rep. 297; *Hughes v. Lacock*, 63 Miss. 112; *Dewey v. Sugg*, 109 N. C. 328; *Crouse v. Murphy*, 140 Pa. St. 335, 23 Am. St. Rep. 232; *Gullett Gin Co. v. Oliver*, 78 Tex. 182.

<sup>53</sup> *York Bank's Appeal*, 36 Pa. St. 458; *Craig v. Sebrell*, 9 Grat.

— Lands and interests therein subject to the lien.

The lien of a judgment usually extends only to land within the jurisdiction of the court rendering the judgment,—that is, it is ordinarily restricted to the limits of the particular county.<sup>54</sup> In most states, however, there are statutory provisions for extending the lien to land in another county by docketing or recording therein a transcript of the judgment.<sup>55</sup>

An estate for life is subject to the lien as being “real estate” or “real property,” within the statutes creating the lien.<sup>56</sup> Whether a leasehold estate is subject to the lien is determined differently in different states, on a construction of the state statute.<sup>57</sup>

An equitable estate or interest in land was not subject to the lien of a judgment under the early English statute before referred to, and is not, at the present day, regarded as so subject, in the absence of a statutory provision to the con-

(Va.) 131; *Cushing v. Edwards*, 68 Iowa, 145. Contra, *Glasscock v. Stringer* (Tex. Civ. App.) 32 S. W. 920.

<sup>54</sup> *Sapp v. Wightman*, 103 Ill. 150; *Kerngood v. Davis*, 21 S. C. 183; *Alsop v. Moseley*, 104 N. C. 60; *Baker v. Chandler*, 51 Ind. 85; 1 Black, Judgments, §§ 417, 418.

<sup>55</sup> *Farmers' Bank of Maryland v. Heighe*, 3 Md. 357; *Firebaugh v. Ward*, 51 Tex. 409; *Yackle v. Wightman*, 103 Ill. 169; *Hubbard v. Jones*, 61 Kan. 722; *Donner v. Palmer*, 23 Cal. 40; *Stewart v. Wheeling & L. E. Ry. Co.*, 53 Ohio St. 151; *Seaton v. Hamilton*, 10 Iowa, 394; *Bergen v. State*, 58 Miss. 623; *Lamb v. Sherman*, 19 Neb. 681.

<sup>56</sup> *Verdin v. Slocum*, 71 N. Y. 345; *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Lancaster County Bank v. Stauffer*, 10 Pa. St. 398; *Bridge v. Ward*, 35 Wis. 687.

<sup>57</sup> That a leasehold estate is not subject to the lien, see *Bismark Building & Loan Ass'n v. Bolster*, 92 Pa. St. 123; *Ely v. Beaumont*, 5 Serg. & R. (Pa.) 124. See, also, *Merry v. Hallet*, 2 Cow. (N. Y.) 497. Contra, *First Nat. Bank of Davenport v. Bennett*, 40 Iowa, 537; *Northern Bank of Kentucky v. Roosa*, 13 Ohio, 334. The statute sometimes expressly provides for a lien on all terms which have more than a certain number of years to run.

trary.<sup>58</sup> In some states, however, a statute imposing the lien on the "real estate" or "real property" of the debtor is considered to include equitable as well as legal interests, and express provisions to the same effect are quite usual.<sup>59</sup> The judgment creditor, moreover, apart from statute, may, after return of execution unsatisfied, file a bill to obtain satisfaction of the judgment out of an equitable interest, and, upon so doing, the judgment becomes effective thereon as against any incumbrances or conveyances subsequent to the date of such filing.<sup>60</sup> Under statutes subjecting equitable interests to the lien, mortgaged land belonging to the judgment debtor, the "equity of redemption," is subject to the lien, even where the legal view of a mortgage is adopted, and, in states where the mortgagee has merely a lien without the legal title, the mortgagor's interest in the land is so subject as a legal estate.<sup>61</sup>

When land is owned concurrently by two or more persons, the undivided interest of each is subject to the lien of a

<sup>58</sup> *Morsell v. First Nat. Bank of Washington*, 91 U. S. 361; *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 710; *Nessler v. Neher*, 18 Neb. 649; *Sipley v. Wass*, 49 N. J. Eq. 463; *Smith v. Ingles*, 2 Or. 43; *Terrell v. Prestel*, 68 Ind. 86; *Dixon v. Dixon*, 81 N. C. 323. In Pennsylvania a different view has been taken, for reasons growing out of the want of a court of equity. *Auwerter v. Mathiot*, 9 Serg. & R. (Pa.) 402.

<sup>59</sup> See *Niantic Bank v. Dennis*, 37 Ill. 381; *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 354; *McKeithan v. Walker*, 66 N. C. 95; *Maxwell v. Vaught*, 96 Ind. 141.

<sup>60</sup> *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 710; *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589; *Roach's Ex'rs v. Bennett*, 24 Miss. 98; *Coutts v. Walker*, 2 Leigh (Va.) 268. See *Ware v. Delahaye*, 95 Iowa, 667.

<sup>61</sup> *Pahlman v. Shumway*, 24 Ill. 127; *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 354; *Trimble v. Hunter*, 104 N. C. 129; *McGuire v. Wilkinson*, 72 Mo. 199; *Macauley v. Smith*, 132 N. Y. 524; *McKeithan v. Walker*, 66 N. C. 95; *Kinports v. Boynton*, 120 Pa. St. 306, 6 Am. St. Rep. 706. And see *Morsell v. First Nat. Bank of Washington*, 91 U. S. 357.

judgment against him to the same extent as an interest in severalty. In case of partition, the lien attaches to the specific land allotted to the judgment debtor,<sup>62</sup> or, in case of sale for purposes of partition, to the fund obtained thereby.<sup>63</sup>

The legal title of a vendor of land who has not yet executed a conveyance is subject to the lien of a judgment against him, to the extent of the purchase money still unpaid,—that is, the lien binds the land so far as the rights of the vendee will not be affected thereby.<sup>64</sup> If all the purchase money has been paid, the vendor has merely a bare legal title, which is not subject to the lien;<sup>65</sup> and if part only, or if none, has been paid, the vendor's title is subject to the lien, which is, however, liable to be divested by the payment of whatever remains due by the vendee.<sup>66</sup>

The equitable interest of the vendee of land who has not yet received a conveyance is, of course, not subject to the lien in those states in which no equitable interests are so

<sup>62</sup> *Bavington v. Clarke*, 2 Pen. & W. (Pa.) 124, 21 Am. Dec. 432; *Emson v. Polhemus*, 28 N. J. Eq. 439, 6 Gray's Cas. 679; *Inhabitants of Argyle v. Dwinel*, 29 Me. 45.

<sup>63</sup> *Eldridge v. Post*, 20 Fla. 579; *Garvin v. Garvin*, 1 Rich. (S. C.) 55.

<sup>64</sup> *Courtney v. Parker*, 21 Neb. 582; *Lefferson v. Dallas*, 20 Ohio St. 68; *Chahorn v. Hollenback*, 16 Serg. & R. (Pa.) 425, 16 Am. Dec. 587; *Moyer v. Hinman*, 13 N. Y. 180; *O'Neil v. Wabash Ave. Baptist Church Soc.*, 4 Biss. 482, Fed. Cas. No. 10,531; *Ware v. Jackson*, 19 Ga. 452.

<sup>65</sup> *Baker v. Thompson*, 36 Minn. 314; *Stannis v. Nicholson*, 2 Or. 335; *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670; *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740.

<sup>66</sup> *Shinn v. Taylor*, 28 Ark. 523; *Hampson v. Edelen*, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530; *Minneapolis & St. L. Ry. Co. v. Wilson*, 25 Minn. 382; *Money v. Dorsey*, 7 Smedes & M. (Miss.) 15; *Moyer v. Hinman*, 13 N. Y. 180; *Minns v. Morse*, 15 Ohio, 568, 45 Am. Dec. 590; *Hurt's Adm'x v. Prillaman*, 79 Va. 257; *Kraner v. Chambers*, 92 Iowa, 681. But, under particular statutes, the failure to record the contract may defeat the vendee's rights as against the judgment lien. *Young v. Devries*, 31 Grat. (Va.) 304; *Anderson v. Nagle*, 12 W. Va. 98.



subject.<sup>67</sup> In states where the judgment lien does exist upon equitable as well as legal interests, the vendee's interest is subject to the lien to the extent to which the purchase money has been paid,—that is, the lien on his interest is subject to the prior right of the vendor to payment of whatever part of the price remains unpaid.<sup>68</sup>

Not only lands which belonged to the judgment debtor at the time of the rendition or docketing of the judgment, but also those thereafter acquired by him, are subject to the lien in all but two of the states.<sup>69</sup>

### — Priorities.

The whole purpose and effect of a judgment lien is to render the lands of the debtor liable to execution under the judgment, without reference to any rights subsequently acquired by other persons, and that it does have such effect has never been questioned.<sup>70</sup> The question, however, whether a judgment lien can bind the land as against rights acquired by others before the rendition of the judgment is a subject as to which the law of the various states is not wholly in accord.

<sup>67</sup> *Evans v. Feeny*, 81 Ind. 532; *Roddy v. Elam*, 13 Rich. Law (S. C.) 343; *Whittington v. Simmons*, 32 Ark. 377.

<sup>68</sup> *Rand v. Garner*, 75 Iowa, 311; *Pugh v. Good*, 3 Watts & S. (Pa.) 56, 37 Am. Dec. 534; *Adams v. Harris*, 47 Miss. 144. See *Stewart v. Berry*, 84 Ga. 177.

<sup>69</sup> *Jackson v. Bank of United States*, 5 Cranch, C. C. 1, Fed. Cas. No. 7,131; *Wales v. Bogue*, 31 Ill. 464; *Ware v. Delahaye*, 95 Iowa, 667; *Colt v. Du Bois*, 7 Neb. 391; *Moore v. Jordan*, 117 N. C. 86, 53 Am. St. Rep. 576; *Barron v. Thompson*, 54 Tex. 235; *Greenway v. Cannon*, 3 Humph. (Tenn.) 177, 39 Am. Dec. 161.

In Ohio the lien does not attach to after-acquired lands (*Smith v. Hogg*, 52 Ohio St. 527), nor does it in Pennsylvania, except in the case of a judgment against a vendee subsequently acquiring the legal title (*Waters' Appeal*, 35 Pa. St. 523, 78 Am. Dec. 354).

<sup>70</sup> See *Fawcetts v. Kimmey*, 33 Ala. 261; *Clark v. Merriam*, 83 Ind. 58; *Hoppock v. Shober*, 69 N. C. 153; *Anderson v. Neff*, 11 Serg. & R. (Pa.) 208; *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338; *Loomis v. Second German Building Ass'n*, 37 Ohio St. 392.

As a general rule, and subject to the statements in the next paragraph, the lien of a judgment is inferior to prior equities,—that is, a court of equity will protect all equitable rights which may have accrued before the attachment of the lien.<sup>71</sup> It is on this principle that the rights of a vendee under an executory contract of sale are regarded as superior to the lien;<sup>72</sup> and likewise the rights of a *cestui que trust* are upheld as against a lien under a judgment against the trustee.<sup>73</sup> So, an equitable lien in favor of a grantor for a part of the price has been held to be superior to a lien subsequently attaching under a judgment against the grantee;<sup>74</sup> and the same principle would seem to apply in the case of any other equitable lien.<sup>75</sup>

While, by the well-settled principles of equity, in thus giving protection to prior equities as against the judgment lien, it is immaterial that the judgment creditor had, before obtaining his judgment, no notice, express or implied, of the existence of such equities,<sup>76</sup> in many states the adoption of

<sup>71</sup> *Brown v. Pierce*, 7 Wall. (U. S.) 205; *Monticello Hydraulic Co. v. Longhry*, 72 Ind. 562; *Frazer v. Thatcher*, 49 Tex. 26; *White v. Denman*, 1 Ohio St. 110; *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381; *Goodell v. Blumer*, 41 Wis. 436; 2 *Pomeroy, Eq. Jur.* § 721; 1 *Black, Judgments*, § 445; 2 *Freeman, Judgments*, § 357.

<sup>72</sup> See ante, note 66.

<sup>73</sup> *Withnell v. Courtland Wagon Co.* (C. C.) 25 Fed. 372; *Hays v. Regar*, 102 Ind. 524; *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740; *Denzler v. O'Keefe*, 34 N. J. Eq. 361.

<sup>74</sup> *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Bowman v. Faw*, 5 Lea (Tenn.) 472; *Messmore v. Stephens*, 83 Ind. 524. Contra, *Allen v. Loring*, 34 Iowa, 499; *Johnson v. Cawthorn*, 21 N. C. 32.

<sup>75</sup> *Wharton v. Wilson*, 60 Ind. 591; *Blankenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608; *Martin v. Nixon*, 92 Mo. 26; *Galway v. Mulchow*, 7 Neb. 285; *Dwight v. Newell*, 3 N. Y. 185; 2 *Pomeroy, Eq. Jur.* § 721.

<sup>76</sup> *Rodgers v. Bonner*, 45 N. Y. 379; *Doswell v. Adler*, 28 Ark. 82; *Wharton v. Wilson*, 60 Ind. 591; *Valentine v. Seiss*, 79 Md. 187. And see cases cited in the four preceding notes.

the recording laws has given rise to a different view, it being held that the lien takes precedence of a prior equity which does not appear of record, and of which the creditor has no actual or constructive notice.<sup>77</sup> So, in some states, holders of judgment liens are regarded as within the protection of the recording laws, with the result that a conveyance of the land, or a mortgage thereof, made by the judgment debtor, if not recorded, is subordinate to the lien of a judgment subsequently rendered in favor of a person without notice of the prior conveyance or mortgage.<sup>78</sup> In other states, however, the judgment creditor cannot take advantage of the failure to record a prior conveyance or mortgage, the equity of the prior grantee or mortgagee being regarded as superior.<sup>79</sup> But even in states in which the judgment lien is thus within the protection of the recording laws, it is usually held that the failure to record the conveyance or mortgage is immaterial if the judgment creditor had notice thereof at the time of recovery of judgment, the requirement of record being regarded as merely for the purpose of furnishing notice.<sup>80</sup>

<sup>77</sup> 2 Pomeroy, Eq. Jur. §§ 722, 723; *Buchanan v. Kimes*, 2 Baxt. (Tenn.) 275; *Humphrey v. Copeland*, 54 Ga. 543; *Massey v. Westcott*, 40 Ill. 160; *Cutler v. Ammon*, 65 Iowa, 281; *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541, 19 Am. St. Rep. 259.

<sup>78</sup> *McCoy v. Rhodes*, 11 How. (U. S.) 131; *Boston v. Cummins*, 16 Ga. 102, 60 Am. Dec. 717; *Town of Tarboro v. Micks*, 118 N. C. 162; *Heermans v. Montague* (Va.) 20 S. E. 899; *King v. Paulk*, 85 Ala. 186; *Grace v. Wade*, 45 Tex. 522; *Berryhill v. Smith*, 59 Minn. 285; *Hunt v. Swayze*, 55 N. J. Law, 33; 2 Pomeroy, Eq. Jur. § 722; *Manly v. Pettee*, 38 Ill. 128; *Simple v. Burd*, 7 Serg. & R. (Pa.) 286.

<sup>79</sup> *Pierce v. Spear*, 94 Ind. 127; *SeEVERS v. Delashmutt*, 11 Iowa, 174, 77 Am. Dec. 139; *Moorman v. Gibbs*, 75 Iowa, 537; *Holden v. Garrett*, 23 Kan. 98; *Wilcoxon v. Miller*, 49 Cal. 194; *Donovan v. Simmons*, 96 Ga. 340; *Schroeder v. Gurney*, 73 N. Y. 430; *Knell v. Green Street Building Ass'n*, 34 Md. 67; *Sappington v. Oeschli*, 49 Mo. 244.

<sup>80</sup> *Northwestern Land Co. v. Dewey*, 58 Minn. 359; *Hutchinson v. Bramhall*, 42 N. J. Eq. 372; *Williams v. Tatnall*, 29 Ill. 553; *Britton's Appeal*, 45 Pa. St. 172; *Wyatt v. Stewart*, 34 Ala. 716, 721; 2 Pome-

In the case of a mortgage given for the price of land as a part of the transaction of purchase, no beneficial interest to which the lien can attach is considered to vest in the mortgagor, as against the mortgagee, and it is immaterial that the mortgage is given, not to the vendor, but to a third person, who advances the purchase money.<sup>81</sup>

At common law, a judgment related back to, and was regarded as rendered upon, the first day of the term. This rule still applies in some states, so as to give the lien of the judgment precedence over a prior conveyance made during the term.<sup>82</sup> More generally, however, the lien attaches either at the time of the rendition of the judgment<sup>83</sup> or at the time of its docketing or record.<sup>84</sup>

#### § 571. Attachment liens.

In most, if not all, of the states, there are provisions for the issuance of a writ of "attachment" as auxiliary to an action for the recovery of money, and in advance of the trial thereof, the effect of such process being to give the plaintiff a lien upon such property of the defendant as may be levied on under the writ. In most jurisdictions this writ

roy, Eq. Jur. § 723. *Contra*, *Coward v. Culver*, 12 Heisk. (Tenn.) 540; *Mayham v. Coombs*, 14 Ohio, 428.

<sup>81</sup> *Curtis v. Root*, 20 Ill. 53; *Ransom v. Sargent*, 22 Kan. 516; *Bradley v. Byran*, 43 N. J. Eq. 396; *Haywood v. Nooney*, 3 Barb. (N. Y.) 643; *Cake's Appeal*, 23 Pa. St. 186, 62 Am. Dec. 328; *Laidley v. Aiken*, 80 Iowa, 112, 20 Am. St. Rep. 408; *Stewart v. Smith*, 36 Minn. 82, 1 Am. St. Rep. 651.

<sup>82</sup> *Norfolk State Bank v. Murphy*, 40 Neb. 735; *Clements v. Berry*, 11 How. (U. S.) 398; *Kellerman v. Aultman* (C. C.) 30 Fed. 888; *Davis v. Messenger*, 17 Ohio St. 231; *Jackson v. Luce*, 14 Ohio, 514; *Urbana Bank v. Baldwin*, 3 Ohio, 65.

<sup>83</sup> *Bailey v. Mizell*, 4 Ga. 123; *Smith v. Lind*, 29 Ill. 24. See 1 Black, Judgments, § 443.

<sup>84</sup> *Elwell v. Hitchcock*, 41 Kan. 130; *Reeves v. Johnson*, 12 N. J. Law, 29; *Firebaugh v. Ward*, 51 Tex. 409; *Bailey v. Bailey*, 93 Ga. 768.



can be obtained only for certain causes, specifically named in the statute, usually these being such as render it probable that property of the defendant sufficient to satisfy the judgment may not be legally accessible for the satisfaction of the judgment unless immediately seized. Thus it is frequently provided that an attachment may issue when the defendant has absconded, or is a nonresident, when he has made, or intends to make, a fraudulent conveyance of his property, or when he is about to remove property from the state.<sup>85</sup> In the New England states, however, there are no such restrictions upon the issuance of an attachment, and as a rule it issues as of course upon the direction of the plaintiff. The result is that a creditor may, in these states, usually establish a lien upon the defendant's property from the time of the commencement of the suit, and this has apparently been regarded as sufficient for his protection, without the enactment of any laws providing that his judgment, when obtained, shall be a lien on the debtor's land.

In the absence of a statute otherwise providing, the lien of an attachment does not exist until the officer actually levies under the writ upon property of the defendant, and it extends only to the property so levied on.<sup>86</sup> This levy does not, in the case of land, involve an actual seizure thereof, nor any interference with the possession, it being usually sufficient that the officer indorse on the writ that he has attached the land,<sup>87</sup> describing it with such certainty as is

<sup>85</sup> Drake, Attachment, § 38 et seq.; Kneeland, Attachment, cc. 8-11.

<sup>86</sup> See *Cooper v. Reynolds*, 10 Wall. (U. S.) 308; *Schacklett's Appeal*, 14 Pa. St. 326; *Gray's Adm'r v. Patton's Adm'r*, 13 Bush (Ky.) 625; *Riordan v. Britton*, 69 Tex. 198; *Taffts v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610.

<sup>87</sup> *Wood v. Weir*, 5 B. Mon. (Ky.) 544; *Boyle v. Ferry*, 12 La. Am. 425; *Perrin v. Leverett*, 13 Mass. 130; *Burkhardt v. McClellan*, 1 Abb. Dec. (N. Y.) 263; *Hancock v. Henderson*, 45 Tex. 479; *Lackey v. Seibert*, 23 Mo. 85.



necessary in the case of a conveyance.<sup>88</sup> In some states, moreover, the return of the officer must be filed or recorded in a particular office in order that the attachment may bind the land as against adverse rights subsequently accruing.<sup>89</sup>

An attachment may usually be levied upon estates in land of almost every character,—both those of freehold and those less than freehold.<sup>90</sup> The right to subject equitable interests to attachment differs in different states.<sup>91</sup> Mortgaged land is subject to attachment in many states, either as constituting a legal interest, or by force of a special statute.<sup>92</sup> The interest of a mortgage before foreclosure, being a mere chose in action, is usually not attachable.<sup>93</sup>

As a general rule, the attachment lien binds only such interest as the debtor has at the time of the levy, and is subject to all rights or equities which may have accrued in favor of

<sup>88</sup> *Biggs v. Blue*, 5 McLean, 148, Fed. Cas. No. 1,403; *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614; *Henry v. Mitchell*, 32 Mo. 512; *Howard v. Daniels*, 2 N. H. 137; *Grier v. Rhyne*, 67 N. C. 338.

<sup>89</sup> See *Wheaton v. Neville*, 19 Cal. 41; *Raynolds v. Ray*, 12 Colo. 108; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Coffin v. Ray*, 1 Metc. (Mass.) 212; *Bryant v. Duffy*, 128 Mo. 18.

<sup>90</sup> *Waples, Attachment* (2d Ed.) § 246; *Drake, Attachment*, § 232 et seq.; *Kneeland, Attachment*, § 361.

<sup>91</sup> That an equitable interest is not subject to attachment, see *Lowry v. Wright*, 15 Ill. 95; *Shoemaker v. Harvey*, 43 Neb. 75; *Blackburn v. Clarke*, 85 Tenn. 506. That equitable interests are so subject, see *Fish v. Fowlie*, 58 Cal. 373; *Davenport v. Lacon*, 17 Conn. 278; *Bullene v. Hiatt*, 12 Kan. 98; *Bailey v. Warner*, 28 Vt. 87; *McCamant v. Batsell*, 59 Tex. 363. So, in some states, the interest of the vendee under a contract of sale is attachable. *Johnson v. Bell*, 58 N. H. 395; *Higgins v. McConnell*, 130 N. Y. 482; *Whittier v. Vaughan*, 27 Me. 301.

<sup>92</sup> *Reed v. Bigelow*, 5 Pick. (Mass.) 281; *De Wolf v. Murphy*, 11 R. I. 630; *Godfrey v. Monroe*, 101 Cal. 224; *Eastman v. Knight*, 35 N. H. 551; *Hawes' Appeal*, 50 Conn. 317.

<sup>93</sup> *McGurren v. Garrity*, 68 Cal. 566; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646; *Marsh v. Austin*, 1 Allen (Mass.) 235; *Columbia Bank v. Jacobs*, 10 Mich. 349, 81 Am. Dec. 792; *Barrett v. Sargeant*, 18 Vt. 365.

other persons before the date of the levy.<sup>94</sup> Accordingly, apart from any question of notice, an attachment against a trustee cannot affect the rights of a *cestui que trust*,<sup>95</sup> and a conveyance or mortgage takes precedence of an attachment subsequently levied.<sup>96</sup> In some states, however, attaching creditors, like judgment creditors,<sup>97</sup> are within the protection of the recording acts, and are consequently not affected by prior equities, incumbrances, or conveyances, which do not appear of record, and of which they have no notice.<sup>98</sup>

The attachment lien is perfected by a judgment for plaintiff in the action to which the attachment is auxiliary, he then having a lien on the property attached, which he may enforce by a sale under execution, or, in some states, by a special proceeding under the order of the court. The judgment should specifically recognize the attachment lien, and in some states its failure so to do involves a loss of the lien.<sup>99</sup>

A sale under execution upon the judgment passes to the purchaser the interest of the judgment debtor as it existed at the time of the levy of the attachment, free from any ad-

<sup>94</sup> *Tennant v. Watson*, 58 Ark. 252; *Columbia Bank v. Jacobs*, 10 Mich. 349, 81 Am. Dec. 792; *Furman v. McMillan*, 2 Lea (Tenn.) 121; *Depeyster v. Gould*, 3 N. J. Eq. 474, 29 Am. Dec. 723; *Jamison v. Miller*, 27 N. J. Eq. 586; *Harrall v. Gray*, 10 Neb. 186; *Bateman v. Backus*, 4 Dak. 433; *Hoag v. Howard*, 55 Cal. 564; *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381; *Hope v. Blair*, 105 Mo. 85, 24 Am. St. Rep. 366.

<sup>95</sup> *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252; *Houghton v. Davenport*, 74 Me. 590; *Haynes v. Jones*, 5 Metc. (Mass.) 292; *Dow v. Sayward*, 14 N. H. 9; *Tucker v. Vandermark*, 21 Kan. 263.

<sup>96</sup> See cases cited in note 94.

<sup>97</sup> *Ante*, § 570.

<sup>98</sup> *Woodward v. Sartwell*, 129 Mass. 210; *Houston v. McCluney*, 8 W. Va. 135; *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614; *Wise v. Tripp*, 13 Me. 9; *Bigelow v. Topliff*, 25 Vt. 273, 60 Am. Dec. 264; *Carr v. Thomas*, 18 Fla. 736; *Jerome v. Carbonate Nat. Bank of Leadville*, 22 Colo. 37.

<sup>99</sup> See *Waples, Attachment*, § 893 et seq.

verse rights or claims which may have accrued since such levy.<sup>100</sup>

### § 572. Execution liens.

In some states, the delivery to the sheriff of a writ of execution under a judgment creates a lien on such property of the judgment defendant as is subject to levy under the execution.<sup>101</sup> In most states, however, the mere delivery of the writ to the sheriff does not create any lien, and a levy under the writ is necessary to make the claim of the creditor effective as against adverse claims to and equities in the debtor's property.<sup>102</sup>

So far as a lien already exists by force of the judgment, any additional lien by virtue of the execution is usually of no value,<sup>103</sup> and, in view of the fact that the former lien is recognized in most of the states, there seems to be but slight occasion for the consideration of an execution lien in connection with the law of land.<sup>104</sup>

The lien of an execution, whether arising from the issue or the levy of an execution, is superior to all rights subse-

<sup>100</sup> *Mattocks v. Farrington*, 2 Hask. 331, Fed. Cas. No. 9,298; *Nason v. Grant*, 21 Me. 160; *Lackey v. Seibert*, 23 Mo. 85.

<sup>101</sup> *Dailey v. Burke*, 28 Ala. 328; *Whitehead v. Woodruff*, 11 Bush (Ky.) 209; *Doe d. McLean v. Upchurch*, 6 N. C. 353; *Williams v. Nellor*, 12 Colo. 1; 2 *Freeman, Executions*, § 200.

<sup>102</sup> See *Wilson's Appeal*, 90 Pa. St. 370; *Anderson v. Taylor*, 6 Lea (Tenn.) 382; *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Smith v. Hogg*, 52 Ohio St. 527; *Sawyers v. Sawyers*, 93 N. C. 321; *Mills-paugh v. Mitchell*, 8 Barb. (N. Y.) 333; *Reeves v. Sebern*, 16 Iowa, 234, 85 Am. Dec. 513; *Albrecht v. Long*, 25 Minn. 163; 2 *Freeman, Executions*, § 202.

<sup>103</sup> See *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256; *Riland v. Eckert*, 23 Pa. St. 215; *McIntyre v. Sanford*, 9 Daly (N. Y.) 21; *Farrrior v. Houston*, 100 N. C. 369, 6 Am. St. Rep. 597.

<sup>104</sup> In states where an execution may be issued to another county without first docketing or recording the judgment therein, the effect of the execution, when so issued, as creating a priority or "lien," may be important.

quently arising, as when the land is sold or incumbered by the execution defendant after the inception of the lien.<sup>105</sup> As a general rule, it takes effect only upon the actual title of the judgment defendant, and is postponed to all rights and equities which may have accrued before its inception.<sup>106</sup> This is not, however, the case in that class of states, before referred to, in which a judgment creditor is regarded as within the protection of the recording acts, and there the lien of an execution takes precedence of unrecorded conveyances, mortgages, or other incumbrances existing at the inception of the lien, but of which the creditor has no notice.<sup>107</sup>

### § 573. Liens for taxes and assessments.

In most of the states it is provided by statute that taxes on a particular piece of land shall constitute a lien thereon. In the absence of such an express provision, there is, it is sometimes said, no such lien.<sup>108</sup> But the effect of a statute authorizing a sale of the land for taxes is undoubtedly to make, in effect, the taxes a lien on the land, since any purchaser or incumbrancer acquires his interest subject to the possibility of such sale unless the taxes are paid.<sup>109</sup> Occa-

<sup>105</sup> *French v. Allen*, 50 Me. 437; *Hall v. Crocker*, 3 Metc. (Mass.) 245; *Doe d. Huggins v. Ketchum*, 20 N. C. 414; *Castleberry v. Weaver*, 30 Ga. 534; *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Young v. Schofield*, 132 Mo. 650; 2 *Freeman, Executions*, § 195.

<sup>106</sup> *O'Rourke v. O'Connor*, 39 Cal. 442; *Phillips v. Roquemore*, 96 Ga. 719; *Holden v. Garrett*, 23 Kan. 98; *Sappington v. Oeschli*, 49 Mo. 244; *Davis v. Owenby*, 14 Mo. 170, 55 Am. Dec. 105; *Righter v. Forrester*, 1 Bush (Ky.) 278.

<sup>107</sup> *Hawkins v. Files*, 51 Ark. 417; *O'Hara v. Booth*, 29 La. Ann. 817; *Davidson v. Beard*, 9 N. C. 520; *Stephens v. Keating* (Tex.) 17 S. W. 37; *Stevenson v. Texas & P. Ry. Co.*, 105 U. S. 703.

<sup>108</sup> *Miller v. Anderson*, 1 S. D. 539; *Morrow v. Dows*, 28 N. J. Eq. 463; *City of Philadelphia v. Greble*, 38 Pa. St. 339; *Cooley, Taxation*, 447.

<sup>109</sup> See *Dunlap v. County of Gallatin*, 15 Ill. 7; *Dougherty v. Miller*,



sionally, taxes due on personalty are made a lien on the land of the owner.<sup>110</sup>

Usually the lien for taxes on the land is, by the statute, imposed upon the land as a whole, and not upon any particular estates or interests therein, so that all equities, interests, and incumbrances, whether they accrued before or after the levy or assessment of the tax, are subordinate to the lien, and liable to be divested by a sale for taxes.<sup>111</sup>

In the absence of any statutory provision determining the time of the inception of the lien, it commences at the time when, "by an extension of the tax upon the roll, a particular sum has become a charge upon a particular parcel of land."<sup>112</sup> This is a matter of importance only for the purpose of determining which of two private individuals shall pay the tax, when, as is ordinarily the case, the tax is a lien on the land as a whole, and not on a particular interest therein.

Assessments for local improvements also may be, and usually are, liens on the land assessed for benefits from the im-

36 Cal. 83; *Hoglen v. Cohan*, 30 Ohio St. 436; *Stokes v. State*, 46 Ga. 412; *Lyon v. Alley*, 130 U. S. 177.

<sup>110</sup> See *New England Loan & Trust Co. v. Young*, 81 Iowa, 732; *Union Trust Co. v. Weber*, 96 Ill. 346; *State v. City of Newark*, 42 N. J. Law, 38; *Albany Brewing Co. v. Town of Meriden*, 48 Conn. 243; *Miller v. Anderson*, 1 S. D. 539; *Cooley, Taxation*, 445.

<sup>111</sup> *Osterberg v. Union Trust Co.*, 93 U. S. 424; *Dunlap v. County of Gallatin*, 15 Ill. 7; *Keating v. Craig*, 73 Mo. 507; *Howell v. Essex County Road Board*, 32 N. J. Eq. 672; *Cooper v. Holmes*, 71 Md. 20. But the statute is sometimes construed as giving a lien only on the interest of the person primarily bound to pay the tax. See *Rhein Bldg. Ass'n v. Lea*, 100 Pa. St. 210; *O'Neill v. Dringer*, 31 N. J. Eq. 507; *Shaw v. City of Allegheny*, 115 Pa. St. 46; *Morrow v. Dows*, 28 N. J. Eq. 459. And a tax on personalty is generally construed as intended to be a lien only on the interest in the land of the person owing the taxes. *State v. City of Newark*, 42 N. J. Law, 38; *Miller v. Anderson*, 1 S. D. 539; *Carter v. Rodewald*, 108 Ill. 351. *Contra*, *New England Loan & Trust Co. v. Young*, 81 Iowa, 732.

<sup>112</sup> *Cooley, Taxation* (2d Ed.) 448; *Black, Tax Titles*, § 189.



provement.<sup>113</sup> The assessment may even take precedence of liens and incumbrances placed on the land before the commencement, or even the ordering of the improvement.<sup>114</sup>

United States internal revenue taxes are, by express statutory provision, made liens upon the real estate of any person liable for such a tax.<sup>114a</sup>

### § 574. The lien of decedent's debts.

The liability of the land of a deceased person to be sold in payment of his debts may be, in most jurisdictions, enforced against not only the heirs or devisees of the land, but against persons claiming by purchase, mortgage, or otherwise, under such heirs and devisees.<sup>115</sup> Consequently, this liability of the land to sale constitutes, in effect, a lien on the land. In England, however, and in at least one state, the liability is enforceable against the land only so long as it

<sup>113</sup> *Lyon v. Alley*, 130 U. S. 177; *Allegheny City's Appeal*, 41 Pa. St. 60; *McKeesport v. Fidler*, 147 Pa. St. 538; *Mix v. Ross*, 57 Ill. 121; *Hawthorne v. City of East Portland*, 13 Or. 271; *Dillon, Mun. Corp.* (4th Ed.) § 821.

<sup>114</sup> *Dale v. McEvers*, 2 Cow. (N. Y.) 118; *Wabash Eastern Ry. Co. v. East Lake Fork Special Drainage Com'rs*, 134 Ill. 384; *Keating v. Craig*, 73 Mo. 507; *Chaney v. State*, 118 Ind. 494; *Provident Institution for Savings v. Jersey City*, 113 U. S. 506.

<sup>114a</sup> Rev. St. U. S. § 3186, as amended by Act March 1, 1879, § 3; *Id.* § 3207; *United States v. Snyder*, 149 U. S. 210.

<sup>115</sup> *Myers v. Pierce*, 86 Ga. 786; *Davis v. Vansands*, 45 Conn. 600; *Nelson v. Murfee*, 69 Ala. 598; *Den d. Warwick v. Hunt*, 11 N. J. Law, 1; *Hyde v. Tanner*, 1 Barb. (N. Y.) 75; *McCoy v. Morrow*, 18 Ill. 519; *Smith v. Gorham*, 119 Ind. 436; *Faran v. Robinson*, 17 Ohio St. 242, 93 Am. Dec. 617.

The court will, however, in particular cases, consider the fact that the land has passed into the hands of a bona fide purchaser, in determining whether the application for sale has been unreasonably delayed. *Ferguson v. Scott*, 49 Miss. 500; *Rosenthal v. Renick*, 44 Ill. 202; *Creswell v. Slack*, 68 Iowa, 110. In New York, the statute requiring the sale to be made in three years applies expressly only in favor of a bona fide purchaser of the land. *Dodge v. Stevens*, 105 N. Y. 585.

remains in the hands of the heirs or devisees, and consequently there it cannot be regarded as a lien.<sup>116</sup>

§ 575. **Liens on crops.**

In many states the landlord has a lien for rent on crops raised on the demised premises,<sup>117</sup> and in some states has likewise a lien thereon for any supplies furnished by him to the tenant for the purpose of raising such crops.<sup>118</sup> This lien usually takes priority of all other liens.<sup>119</sup>

In some states, moreover, a person not the landlord, who makes advances or furnishes supplies for the purpose of enabling the owner of land to raise a crop, may obtain, by agreement made at the time of making the advances or furnishing the supplies, a lien on the crops to be raised.<sup>120</sup> In some states, a lien on crops is given by statute to laborers employed in making them.<sup>121</sup>

<sup>116</sup> *Kindersley v. Jervis*, 22 Beav. 1; *British Mut. Inv. Co. v. Smart*, L. R. 10 Ch. App. 567; *Smith v. Thomas' Heirs*, 14 Lea (Tenn.) 324.

<sup>117</sup> See *Nelson v. Webb*, 54 Ala. 436; *Rotzler v. Rotzler*, 46 Iowa, 189; *Lemay v. Johnson*, 35 Ark. 225; *Love v. Law*, 57 Miss. 596; *Miles v. James*, 36 Ill. 399; *Jones v. Fox*, 23 Fla. 454; *Knowles v. Sell*, 41 Kan. 171; *State v. Reeder*, 36 S. C. 497.

<sup>118</sup> See *Bell v. Hurst*, 75 Ala. 44; *Stewart v. Hollins*, 47 Miss. 708; *Whitmore v. Poindexter*, 7 Baxt. (Tenn.) 248; *Jones v. Eubanks*, 86 Ga. 616; *Stafford v. Pearson*, 26 La. Am. 658.

<sup>119</sup> *Saloy v. Bloch*, 136 U. S. 338; *Lake v. Gaines*, 75 Ala. 143; *Brown v. Hamil*, 76 Ala. 506; *Smith v. Fouche*, 55 Ga. 120; *Carroll v. Bancker*, 43 La. Ann. 1078; *Brewer v. Chappell*, 101 N. C. 251.

<sup>120</sup> See *Boyett v. Potter*, 80 Ala. 476; *Bank of America v. Fortier*, 27 La. Ann. 243; *Airey v. Weinstein*, 54 Ark. 443; *Herman v. Perkins*, 52 Miss. 813; *Warder, Bushnell & Glessner Co. v. Minnesota & Dakota Elevator Co.*, 44 Minn. 390; *Rawlings v. Hunt*, 90 N. C. 270.

<sup>121</sup> *Wilson v. Taylor*, 89 Ala. 368; *Saloy v. Dragon*, 37 La. Ann. 71; *Buck v. Paine*, 50 Miss. 648; *Emerson v. Hedrick*, 42 Ark. 263. Compare *Schilling v. Carter*, 35 Minn. 287.

A statute giving a lien to one who bestows labor on personal property has been held not to give an agricultural laborer a lien on crops. *McDearmid v. Foster*, 14 Or. 417. Contra, *Hogue v. Sheriff*, 1 Wash. T. 172.

**§ 576. The statutory lien for improvements.**

The equitable right of a *bona fide* occupant of land to an allowance for improvements made by him is, as has been stated, secured by courts of equity by the establishment of an equitable lien on the land for the amount thereof.<sup>122</sup> The statutes likewise, in providing for compensation for improvements made by an occupying claimant,<sup>123</sup> sometimes provide expressly or by implication that he shall have a lien for the amount thereof.<sup>124</sup>

**§ 577. Widow's allowance.**

In some states, the statute provides for a pecuniary allowance to the widow of decedent. Occasionally, these statutes have been construed as making the land liable for the payment of such allowance in case of a deficiency of personalty, and in that case the amount thereof may be regarded as a lien on the land until other satisfaction of the claim.<sup>125</sup>

<sup>122</sup> Ante, § 562.

<sup>123</sup> Ante, § 241.

<sup>124</sup> *Barker v. Owen*, 93 N. C. 198; *Whitcomb v. Provost*, 102 Wis. 278.

<sup>125</sup> See *Detweiler's Appeal*, 44 Pa. St. 243; *Rector v. Reavill*, 3 Ill. App. 232; *Blakeman v. Blakeman*, 64 Minn. 315; *Allen v. Allen's Adm'r*, 18 Ohio St. 234; 1 *Woerner, Administration*, § 85.



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